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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIE BRAY, LORENE DAVIS, RANDOLPH WIGGINS, JOAN COLBURN, MARY ROE, JOHN DOE, and all other members of the Class,
Petitioners,

vs.

STATE OF MICHIGAN: Governor of the State of Michigan; MICHIGAN DEPARTMENT OF STATE: Secretary of State; MOTOR VEHICLE ACCIDENT CLAIMS FUNDS DIVISION: Director of the Motor Vehicle Accident Claims Fund; State Treasurer; DEPARTMENT OF COMMERCE — INSURANCE BUREAU: Commissioner of Insurance,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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and
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QUESTIONS PRESENTED

1. Whether the State of Michigan's termination, without cause, of Plaintiffs' state-created entitlement to register and operate their uninsured motor vehicles and the State's refusal to refund the unearned portion of the annual fee paid for the entitlement is a taking of property without just compensation.

2. Whether the State of Michigan's termination, without cause, of benefits which the State had extended to Plaintiffs upon payment of an annual fee and the State's refusal to refund the unearned portion of the annual fee is a taking of property without just compensation.

3. Whether the State of Michigan's appropriation to the general fund of interest earned on moneys in a trust fund is taking of property without just compensation.

PARTIES

This is a class action. All the defendants are listed in the caption and are all represented by the Attorney General of the State of Michigan.

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OPINIONS BELOW

The Michigan Supreme Court Opinion is reported at 418 Mich. 149, 341 N.W.2d 92 (1983) (3a).[1] The Michigan Court of Appeals opinion is reported at 97 Mich. App. 33, 294 N.W.2d 236 (1980) (28a). The Michigan Circuit Court opinion is unreported (36a).[2]

JURISDICTION

The Michigan Supreme Court issued and entered its opinion on December 1, 1983 (3a). Plaintiffs filed a timely application for rehearing on December 21, 1983. The Michigan Supreme Court entered its order denying rehearing on January 31, 1984 (1a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, §10 of the Constitution of the United States provides in pertinent part:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

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[1] References are to the Appendix attached to this petition.

[2] The issues before this Court were addressed on remand from the Michigan Court of Appeals. The first Michigan Court of Appeals and Circuit Court opinions did not address the constitutional issues. The first Court of Appeals opinion is reported at 69 Mich. App. 172, 244 N.W.2d 614 (49a). The first Circuit Court opinion is unreported (68a).

The Fifth Amendment of the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant Michigan statutes are reprinted in the Appendix as they were in effect when this action was instituted.

1965 Mich. Pub. Acts, No. 198; 1967 Mich. Pub. Acts, No. 274; 1971 Mich. Pub. Acts, Nos. 19, 63 (Mich. Comp. Laws §257.1101 *et seq.*) (77a).

1967 Mich. Pub. Acts; Extra Session, No. 3 (Mich. Comp. Laws §257.226) (94a).

1972 Mich. Pub. Acts, No. 294, §1 (Mich. Comp. Laws §§500.3101, 3102) (95a).

1973 Mich. Pub. Acts, No. 59, §2 (96a).

STATEMENT OF THE CASE

The Michigan Supreme Court decision in this case is an affront to Constitutional principles which this Court has repeatedly and recently applied to protect the citizens of the United States from actions of their state governments, and as such requires the attention of this Court.

In return for payment of a fixed fee, the State of Michigan extended to motor vehicle owners who had not purchased insurance, certain rights and entitlements for the 1973 motor vehicle registration year. Despite the State's promise to provide benefits (by accepting the annual payment) through the 1973 registration year, it revoked these benefits without cause mid-way through the registration year and refused to refund the unused and unearned portion of the consideration paid. The State's termination of the entitlements and its refusal to return the unused portion of the fee constitutes a taking of property without just compensation and an impairment of contract in violation of Article 1, §10 and the Fifth and Fourteenth Amendments of the Constitution of the United States.

Plaintiffs are the class of approximately 350,000 motor vehicle owners who, in 1973, paid the *requisite* $45 *annual* fee to the State of Michigan so they would be permitted to operate their uninsured motor vehicles for the 1973 registration year.

Under the Michigan Motor Vehicle Accident Claims Act ("the Act"), "[e]very person registering an *uninsured* motor vehicle in this state shall pay *annually* at the time of registering . . . a fee of $45.00." Mich. Comp. Laws §257.1103(3) (emphasis added).[3] Payment of this fee gave the registrant the right to operate his uninsured vehicle. Without payment, operation of an uninsured vehicle was a misdemeanor. Mich. Comp. Laws §§257.1103(7); 257.1104. This

[3] The Act is reprinted in the appendix (77a). References to the Act are the Michigan Compiled Law Sections which were in effect when this litigation was instituted.

annual fee was placed in a trust fund ("the Fund") established under the Act. Mich. Comp. Laws §257.1103(1).[4]

The Fund was to be used to advance moneys to victims of motor vehicle accidents involving uninsured or unidentified drivers and to pay administrative expenses, including those relating to any defense undertaken on behalf of uninsured drivers. Mich. Comp. Laws §§257.1104; 257.1106; 257.1108; 257.1110; 257.1112; 257.1115; 257.1118; 257.1119; 257.1123; 257.1126; 257.1127. The Fund was a self-supporting special trust fund; with the exception of payments made in situations where the driver was unidentified, moneys paid to claimants were to be recovered from the uninsured motorist.

Under the Act, a victim of an automobile accident occurring in Michigan, which was caused by an uninsured motor vehicle; or an unidentified motor vehicle and an unidentified driver; or an unidentified driver who had possession of the vehicle without the owner's consent, could claim personal injury and property damages from the Fund. Mich. Comp. Laws §§257.1106; 257.1112; 257.1115.

The Secretary of State ("Secretary") was deemed to be the agent of the owners or operators of uninsured motor vehicles. Mich. Comp. Laws §257.1105. A claimant was required to serve the Secretary as a prerequisite to seeking recovery from the Fund. The Secretary was required to notify the uninsured motorist if identified. *Id.*

The Act authorized the Secretary to make payment out of the Fund (without judgment) only if "[t]he owner and driver of the uninsured motor vehicle, against whom liability is alleged, execute written *consent to the payment of the sum for damages out of the fund* and also execute an agreement in writing to repay the fund the amount to be paid from the fund. . . ." Mich. Comp. Laws §257.1106(3)(b) (emphasis added).

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[4] The Act also provided that if the Fund did not have a free surplus (as defined), insured drivers were to pay an annual $1 fee which was to be placed in the Fund. Mich. Comp. Laws §257.1103(4)(5). There was a statutory surplus and insured drivers did not pay the $1 fee for the 1971 registration year and the registration years thereafter.

If the claimant instituted litigation, the Secretary could act on behalf of the uninsured driver, like a private insurer, including the undertaking of the driver's defense and settlement of the action. Mich. Comp. Laws §§257.1105; 257.1108(2).

In any case where payment was made from the Fund and the driver was identified, the driver was required to repay the Fund and had the right to work-out an *interest-free installment payment agreement with the Secretary*. Mich. Comp. Laws §§257.1106(5)(b); 257.1110(b).

In addition to payment of claims and advancement of payments on behalf of uninsured motorists, the Fund was used to pay wages, professional fees and costs incurred in defending the Fund. Mich. Comp. Laws §§257.1126; 257.1127.

The Act specifically provided that the unappropriated moneys in the Fund were to be deposited to earn interest. Mich. Comp. Laws §257.1103(1). The interest income was required to be added to the corpus of the Fund, and thereby enhance the ability of the Fund to pay the unreimbursed claims and expenses. Mich. Comp. Laws §257.1103(1).

The self-supporting aspect of the Fund worked so well that the Fund accumulated a surplus, so that insured motorists were not required to contribute $1 each for the 1971, 1972 and 1973 registration years. *Bray* v. *Department of State*, 418 Mich. 149, 154, n. 1, 341 N.W.2d 92 (1983) (4a). And, in 1971, the Michigan Legislature authorized a *$45 million loan* from the Fund to the General Fund. Mich. Comp. Laws §257.1103a. This loan was authorized upon the Michigan Attorney General's Opinion that the annual $45 fee was a regulatory fee, and not a tax.[5] In providing for the *loan*, the Legislature repeated the requirement that interest be paid on all unappropriated Fund moneys "at a rate to be determined . . . by the Legislature." However, 26 months

[5] A copy of the Opinion is included in the Appendix (97a).

later, the State Treasurer repaid the entire $45 million loan without interest, thereby illegally depriving the Fund of at least $5 million in interest income. 1973 Mich. Pub. Acts, No. 59, §2(a) (95a).

Thus, for their $45 payment, Plaintiffs received from the State, the right: to operate their uninsured vehicles for the 1973 registration year; to participate in the decision of whether payment should be made from the Fund if a claim were submitted against them; to work out an interest-free repayment plan if moneys were paid from the Fund on their behalf; and to a possible defense undertaken on their behalf if litigation were instituted.

In 1973, as in many prior years, the registration year for passenger vehicles ran from April 1st to March 31st.[6] 1967 Mich. Pub. Acts, Extra Session No. 3, Mich. Comp. Laws §257.226 (94a). At the time Plaintiffs paid their $45 fees, they expected to be permitted to operate their uninsured motor vehicles and receive benefits under the Act through the balance of the 1973 registration year.

Mid-way through the 1973 registration year, on October 1, 1973, the Michigan No-Fault Insurance Act ("No-Fault Act") went into effect. 1972 Mich. Pub. Acts, No. 294, Mich. Comp. Laws §500.3101 *et seq.*[7] Under the No-Fault Act, all registrants of motor vehicles are required to maintain no-fault insurance which meets statutory conditions. Mich. Comp. Laws §500.3101(1) (95a). A violation of that Act is a misdemeanor punishable by a fine and/or imprisonment for up to one year. Mich. Comp. Laws §500.3102(2) (95a).

All motor vehicle operators, including Plaintiffs, were required to purchase and have in effect no-fault insurance on

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[6] The registration year for commercial vehicles expired on the last day of February. 1967 Mich. Pub. Acts; Extra Session, No. 3, Mich. Comp. Laws §257.226 (94a).

[7] The Michigan Supreme Court has held that the effective date of the No-Fault Act was October 1, 1973. *See, Shavers* v. *Attorney General*, 402 Mich. 554, 578, 267 N.W.2d 72 (1978), *cert. den., Allstate Ins. Co.* v. *Kelley*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979).

October 1, 1973. Hence, Plaintiffs' entitlement to operate their uninsured vehicles and the benefits afforded them under the Act were terminated six months before expiration of the 1973 annual registration year.

The State refused to refund the unused and unearned portion of the $45 fee collected in exchange for the State's promise to extend benefits through the 1973 registration year. Accordingly, on August 28, 1973 (more than one month before the effective date of the No-Fault Act), Plaintiffs filed suit against the State and agencies thereof on behalf of themselves and all other members of the affected class. Plaintiffs sought a refund of the unused portion of the $45 uninsured motorist fee ($22.50 per person for owners of passenger vehicles), a return of excess moneys contained in the Fund which were not needed to satisfy claims and an order directing the State to pay to the Fund a reasonable amount of interest on the $45 million loan which the State had improperly repaid without interest.

Plaintiffs filed a motion for partial summary judgment and/or declaratory relief under various common law, statutory and constitutional theories. The Michigan Circuit Court held on non-constitutional grounds that Plaintiffs were entitled to a refund of the unearned portion of the 1973 fee, plus interest (64a, 68a).

The Court of Appeals agreed with the Circuit Court's holding that Plaintiffs were entitled to the refund, but on a different basis, and remanded the case to the Circuit Court for further proceedings. *Bray* v. *Department of State*, 69 Mich. App. 172, 244 N.W.2d 619 (1976) (55a).

On remand, the Circuit Court entered an order modifying its original Judgment to conform to the Court of Appeals decision (52a). Acknowledging that the constitutional issues were never addressed, the Circuit Court ruled that it would then consider the constitutional grounds. In accordance with the order of the Circuit Court, Plaintiffs amended their complaint and motion for summary and/or declaratory relief to set forth the constitutional claims with more specificity.

Following oral argument, the Circuit Court issued an opinion holding that the State's refusal to refund Plaintiffs' money was an unconstitutional impairment of contract and an unconstitutional taking of property (38a-48a). The Court found that the State had a constitutional obligation to expeditiously refund the unused portion of the 1973 $45 fee exacted from Plaintiffs, and entered a judgment ordering the State to immediately refund that portion plus interest (38a-48a).

The State appealed the constitutional issues addressed by the Circuit Court to the Michigan Court of Appeals. The Court of Appeals affirmed the Circuit Court's opinion that Plaintiffs were entitled to an immediate refund, holding that the State had committed a taking of property without just compensation. *Bray* v. *Department of State*, 97 Mich. App. 33, 39-43, 294 N.W.2d 236 (1980) (31a-35a).

On December 1, 1983, Michigan Supreme Court reversed. *Bray* v. *Department of State*, 418 Mich. 149, 341 N.W.2d 92 (1983) (3a). The court did not specifically address the constitutional issues. It held that Plaintiffs did not receive any benefits from the Act, and therefore the $45 fee, which Plaintiffs paid, was a tax. On that basis, the court held Plaintiffs were not entitled to a refund.[8] On January 31, 1984, the Michigan Supreme Court denied Plaintiffs' application for rehearing (1a).

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[8] Two of the seven Justices dissented. They would have granted a refund on non-constitutional grounds. 418 Mich. at 165-179 (14a-27a). The dissenters found that the fee was not a tax, because such a construction would deem the Act violative of then — Article 9, sections 3 and 9 of the Michigan Constitution. 418 Mich. at 170-172 (19a-21a). The majority refused to address the question of whether its interpretation would render the Act violative of the Michigan Constitution. 418 Mich. at 164-165, n. 5 (13a-14a).

REASONS FOR GRANTING THE PETITION

1. THE MICHIGAN SUPREME COURT OPINION, WHICH IGNORED PLAINTIFFS' STATE-CREATED PROPERTY INTEREST IN THEIR RIGHT TO REGISTER AND OPERATE THEIR MOTOR VEHICLES, CONFLICTS WITH DECISIONS OF THIS COURT

In essence, the Michigan Supreme Court ignored Plaintiffs' claim of an unconstitutional taking. The court held that because the Act did not create an "insurance policy," Plaintiffs received no benefits and thus there was no protected interest. 418 Mich. at 154, 158-160 (4a, 8a-9a). In so holding, the court completely failed to address or recognize that Plaintiffs had a property interest in their expectation (created by the State) to operate their uninsured vehicles through the 1973 registration year. Hence, the State's retention of private funds, which Plaintiffs paid for this undelivered entitlement, constituted an unconsitutional taking.[9] The Michigan Supreme Court's opinion is blatently inconsistent with decisions of this Court.

The Fifth Amendment of the Constitution of the United States provides in pertinent part:

> "nor shall private property be taken for public use, without just compensation."

The Fifth Amendment prohibition applies to the State of Michigan through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 169, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980); *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 239, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

Property rights are not delineated in the Constitution. They arise by virtue of State-created expectencies. As recently reiterated by this Court:

> " '[P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimen-

[9] There is no question that the State did not pay compensation — it refused to refund the unearned fees.

sions are defined by existing rules or understandings that stem from an independent source such as state law . . . .' *Board of Regents* v. *Roth*, 408 US 564, 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972)." Quoted with approval in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith, supra*, 449 U.S. at 161.

The Michigan Supreme Court has included in the definition of protected property interests, the right to register and operate a motor vehicle:

> "In Michigan the independent mobility provided by an automobile is a crucial, practical necessity; *it is undeniable that whether or not a person can obtain a driver's license or register and operate his motor vehicle profoundly affects important aspects of his day-to-day life.*
>
> * * *
>
> A driver's license, once issued, is a significant interest subject to constitutional due process protections. *Bell* v. *Burson*, 402 US 535, 539; 91 S Ct 1586; 29 L Ed 2d 90 (1971) . . . . A driver's license is, clearly, of little use unless a licensee can register and operate a motor vehicle. *We believe that the interest in registering and operating a motor vehicle is as significant as the interest in the use of a driver's license.*" *Shavers* v. *Attorney General*, 402 Mich. 554, 598-599, 267 N.W.2d 72 (1978) (emphasis added), *cert. den., Allstate Ins. Co.* v. *Kelley*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979).[10]

In so concluding, the court recognized that the Constitution protects the legitimate expectency that a state-created benefit will continue through the term that it is offered:

> "*The existence of interests or benefits entitled to due process protection depends on the extent to which gov-*

[10] This Court generally accepts the State's definition of property interest. *See, Kaiser Aetna* v. *United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

> *ernment activity has fostered citizen dependency and reliance on the activity*. We are reminded: 'It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.' *Board of Regents* v. *Roth*, 408 US 564, 577. The Supreme Court, 1975 Term, 90 Harv L Rev 86-104 (1976); Tribe, American Constitutional Law, pp 514, 522; *Pennsylvania Coal Mining Ass'n* v. *Insurance Dep't*, 471 Pa 437; 370 A2d 685 (1977)." 402 Mich. at 598 (emphasis added).

Plaintiffs legitimately expected and relied on their right to operate their uninsured vehicles through the 1973 registration year. That expectancy was created by the continued existence of the uninsured motorist program for eight years and by the State's demand for and acceptance of the full "annual" fee in 1973. The State's acceptance of the fee created a right and Plaintiffs were thus entitled to receive the benefit of their bargain or the value of the paid-for benefit.[11]

The Michigan Supreme Court, having declared that "the interest in registering and operating a motor vehicle" is property, was obliged to address (which it did not) the second question of whether the State's termination of this property interest and retention of moneys paid for that interest (clearly private property) was a taking. The Court ignored Plaintiffs property interest by declaring that the fee was a tax. However, a court's attempted recharacterization cannot transform a state-created entitlement into a non-property interest. *See*, *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, *supra*.[12]

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[11] The Michigan Court of Appeals recognized that plaintiffs entitlement to register and operate their cars was a property interest. 97 Mich. App. at 39 (31a-32a).

[12] The Michigan Supreme Court's characterization was disingenuous to say the least. As the dissenting opinion recognized, the majority's construction — that the Act imposed a tax — rendered the Act to be unconstitutional under the Michigan Constitution. 418 Mich at 170-172 (19a-21a). The majority's interpretation of the Act violates firmly established principles of statutory construction which require that statutes be

(footnote con't on next page)

Similar terminations of entitlements or benefits have long been recognized as deprivations within the meaning of the due process clause. *See, Bell* v. *Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (right to drive); *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (right to continued receipt of welfare benefits); *Sherbert* v. *Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (right to unemployment compensation); *Bundo* v. *Walled Lake*, 395 Mich. 679, 238 N.W.2d 154 (1976) (right to renewal of liquor license). *See also, Redevelopment Authority of Philadelphia* v. *Lieberman*, 461 Pa. 208, 336 A.2d 249 (1975); *Redevelopment Authority of Philadelphia* v. *Driscoll*, 45 Pa. Cmwlth. 202, 405 A.2d 975 (1979); *Redevelopment Authority of Philadelphia* v. *Royal Janet Corp.*, 42 Pa. Cmwlth. 546, 401 A.2d 17 (1979); *State* v. *Saugen*, 283 Minn. 402, 169 N.W.2d 37 (1969) (right to compensation for liquor license in condemnation proceeding).[13]

(footnote 12 con't from page 18)

contrued so as to be constitutional and constitutional questions be avoided if another interpretation is possible. *Machinists* v. *Street*, 367 U.S. 740, 749-750, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Crowell* v. *Benson*, 282 U.S. 22, 62 S.Ct. 285, 76 L.Ed. 598 (1931); *Workman* v. *Detroit Auto Inter-Insurance Exchange*, 404 Mich. 477, 507, 508, 274 N.W.2d 373 (1979). The majority refused to address the question of whether, under its interpretation, the Act was unconstitutional, possibly because the Act is no longer in effect. 418 Mich. at 164-165, n. 5 (13a-14a). However, that legislation is no longer in effect cannot obviate the court's responsibility to apply a constitutional construction. If the Michigan Supreme Court had been asked to decide the legality of the fee during the currency of the Act, it would surely not have held it to be a tax, so as to render the Act unconstitutional.

Indeed, when the Legislature approved the $45 million loan to the general fund, the State Attorney General issued an opinion stating that the fee was not a tax, otherwise the loan would have been illegal. 418 Mich. at 172, n. 14 (21a) (97a).

[13] While some of these cases involve procedural due process questions, the definition of property interests is the same. "There seems to be no good reason why the broader definition [of property interests utilized in procedural due process cases] should not be extended to the takings context." Tribe, *American Constitutional Law* (1978) §9-2, p. 459 n. 11. Indeed, in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith, supra* — a "taking case" — this Court applied the definition of property as developed in procedural due process cases.

The State's termination of Plaintiffs' entitlement to operate their uninsured vehicles, even though due to subsequent legislation, constitutes a taking. *Lynch* v. *United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); *Ward* v. *Board of Commissioners of Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Houston T.C.R. Co.* v. *Texas*, 170 U.S. 243, 18 S.Ct. 610, 42 L.Ed. 1023 (1898).

This Court has held that any governmental appropriation of private property, without the justification of some paramount public purpose, is a violation of the Just Compensation Clause. *Lynch* v. *United States, supra*. (Federal government's retroactive repudiation of war risk insurance policies held a taking of property without just compensation, as well as an unconstitutional impairment of contract and a due process violation).

The Michigan Court of Appeals held that the State's action in this case was not difficult to categorize; it was a blatant refusal by the State to return funds to Plaintiffs after depriving them of the entitlements for which they had paid. 97 Mich. App. at 39-43 (31a-35a).

That the State's action in this case constitutes an impermissible taking is evident. The State has indeed deprived Plaintiffs of the entitlement to operate their uninsured vehicles for which they paid. And, the State has collected and retained approximately $22.50 per Plaintiff on the promise of a benefit which was not conferred. Such action is not "regulation" by any stretch of the imagination; it is not justifiable as necessary to protect the public health or safety. Plaintiffs' demand for a refund poses no threat to either health or safety. No cataclysmic condition, such as war or riot, exists. And certainly, Plaintiffs cannot be accused of some noxious use. This is a simple case of governmental appropriation of private property — an "invasion" of the most basic nature.

Additionally, Plaintiffs' right to a refund is not outweighed by the State's interest in using Plaintiffs' funds for

other purposes. Plaintiffs do not doubt that the State will attach a higher priority to any use — other than a refund — that might be made of Plaintiffs' refund money. The fact is, however, that Plaintiffs are entitled to a refund. The State cannot avoid its debt to Plaintiffs simply by pointing to other uses that could be made of these funds which the State considers to be beneficial to the public. As this Court recently reminded: "*[t]he State cannot refuse to meet its legitimate financial obligation simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.*" *United States Trust Co. of New York* v. *New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92, *reh. den.*, 431 U.S. 975, 97 S.Ct 2492, 53 L.Ed.2d 1073 (1977) (emphasis added).

Few principles of constitutional law are more elementary than the right to prompt and full remedy for injuries inflicted by the government. *Ward* v. *Board of Commissioners of Love County, supra*. In *Ward*, Congress had given a 21-year tax exemption to Indians. Ten years later — 11 years before the exemption would have expired according to its terms — Congress enacted legislation which had the effect of repealing the exemption. The county then levied and collected property taxes on the land, which the Indians paid under protest. The Indians prevailed on their argument that the subsequent statute which resulted in the collection of taxes constituted a taking of property without just compensation.

This Court held that the taxes, having been collected unlawfully, must be refunded. It was immaterial that the county no longer possessed some portion or all of the funds collected, having turned them over to the state:

> "It is a well settled rule that 'money got through imposition' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. . . .'"

> "If it be true, as the [Oklahoma] supreme court assumed, that a portion of the taxes was paid over, after collection to the state and other municipal bodies, we regard it as certain that this did not alter the county's liability to the claimants. The county had no right to collect the money, and it took the same with notice that the rights of all who were to share in the taxes were disputed by these claimants, and were being contested in the pending suits." 253 U.S. at 24.

This case has the same elements that were operative in *Ward*: (1) liability by the State to Plaintiffs; and (2) notice by the pendency of this lawsuit — before the effective date of the No-Fault Act — that Plaintiffs contested the State's right to take their property, *i.e.* terminate their entitlements without just compensation.

Here, if the fee could be construed as a tax, it would render the Act violative of the Michigan Constitution and therefore collection of the fees were illegal. Hence, under *Ward*, the State's imposition of this illegal tax would constitute a taking of property without just compensation.

This Court should grant *certiorari* to address the question of whether the State of Michigan's termination of Plaintiffs' State-created entitlement to operate their uninsured motor vehicles through the 1973 registration year and the State's refusal to refund the unearned portion of the fee paid for the entitlement constituted a taking of property without just compensation.

2. THE MICHIGAN SUPREME COURT OPINION, WHICH IGNORED PLAINTIFFS' CONTRACT WITH THE STATE, CONFLICTS WITH DECISIONS OF THIS COURT

In rejecting Plaintiffs' claim that their relationship with the State constituted a contract, the Michigan Supreme Court said that the Act was not an insurance policy and "plaintiffs were clearly not buying anything" and "were

[not] securing any benefits." 418 Mich. at 158-159 (8a).[14] This declaration is an erroneous characterization of the facts and inconsistent with opinions of this Court.

First, it cannot be denied that Plaintiffs purchased benefits from the State. Under the Act, payment of the $45 elicited the State's promise that it would in effect loan Plaintiffs up to $10,000, *interest free*, per claim. Essentially, the Act was a statutory self-insurance contract or a type of surety contract. The State was obliged to pay claimants, and the uninsured motorists were responsible to reimburse the Fund. Rather than face the possibility of immediate garnishment, execution and loss of property which could occur without the benefits provided under the Act, by paying the $45 motorists were guaranteed the right to work-out an installment repayment plan.

To be sure, many motorists would welcome the repeal of the No-Fault Act's mandatory insurance requirement (which could cost hundreds or even thousands of dollars per year) and the reinstatement of the uninsured motorist fee, which while it did not provide traditional insurance protection, provided definite financial protection for a relatively small fee.

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[14] Plaintiffs have never asserted that the Act was an insurance policy. However, finding a contractual relationship does not depend on finding that a traditional insurance contract was formed under the Act. In any event, the Act was similar in many respects to an insurance policy. The Act, like insurance contracts, established liability limitations. Mich. Comp. Laws §257.1123. The State was the agent of the uninsured motorist and received notice of litigation. Private insurers may likewise be required to accept service. *Krueger* v. *Williams*, 410 Mich. 144, 300 N.W.2d 910, *appeal dism'd., Detroit Auto. Inter-Insurance Exchange* v. *Rodgers*, 452 U.S. 956, 101 S.Ct. 3102, 69 L.Ed.2d 967 (1981). While the State had no duty to defend (as in most insurance contracts), it had that option. Mich. Comp. Laws §§257.1105; 257.1108(2). Like an insurance contract, the Secretary had the power to settle claims within the limits. Mich. Comp. Laws §257.1123. However, because the uninsured motorist was ultimately responsible, payments from the Fund were conditioned on his approval. Mich. Comp. Laws §257.1106(3).

The Legislature recognized that the Act created a *pseudo* insurance agreement. Under the Act, the Commissioner of Insurance had the power to examine "the affairs of the funds as through the fund were an insurer." Mich. Comp. Laws §257.1103(2). And, the records of the Fund were to be maintained "in accordance with insurance accounting principles" which were to be examined by the Insurance Bureau of the Department of Commerce. Mich. Comp. Laws §257.1103(5).

In addition, under the Act, the Secretary of State had the right to intervene and could "conduct his [the uninsured motorist] defense" or "consent to judgment." Mich. Comp. Laws §§257.1105; 257.1108. If the uninsured motorist had a worthwhile defense, it can be assumed that the Secretary would have acted on his behalf in order to protect the Fund. Indeed, the Secretary was a fiduciary of the Fund and thus had the obligation to defend it. This free legal representation would help protect the uninsured motorist from incurring any liability and a judgment being entered against him. *See, Moore* v. *Baugh*, 106 Mich. App. 815, 820, 308 N.W.2d 698 (1981).

Certainly, interest-free loans and free legal representation were substantial benefits.[15] Hence, the Act established a contractual relationship between the State and uninsured motorists under which the State agreed to provide limited protection for the uninsured motorist for a term to expire at the end of the 1973 registration year. As consideration for the State's promise, the uninsured motorist paid an annual fee of $45. Even though the State did not enter into this relationship for gain or business purposes, because it involved an agreement between the parties, it is a contract. *Indiana ex*

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[15] Indeed, the State conceded that Plaintiffs received benefits for their $45 payment. In its brief in the Michigan Supreme Court, the State admitted that Plaintiffs received the following benefits:

"a) the right to receive notice of a claim against them;

b) the right to contest liability which allowed them to continue driving until a judicial determination ruled them liable, in which case their licenses could be suspended for failure to satisfy the claim or enter into a repayment agreement with the Fund;

c) although not having direct legal representation by a Special Assistant Attorney General (whose primary purpose was to defend the interests of the Fund), the net effect of such legal representation on behalf of the Fund was to benefit the uninsured motorists since it guarded against fraudulent claims and reduced greatly exaggerated claims;

d) in the event of either an administrative payment or by virtue of a judgment against the uninsured motorist, they still retained the right to drive by repaying the amount paid by the Fund — all without any interest or legal fees."

rel. Anderson v. *Brand*, 303 U.S. 95, 58 S.Ct. 443, 83 L.Ed. 685, *reh. den.*, 303 U.S. 667, 58 S.Ct. 641, 82 L.Ed. 1123 (1938); *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647 (1922).

The contract clause of the Constitution of the United States provides that "no state shall . . . pass any . . . law impairing the obligation of contract." U.S. Const., Art. I, §10.

This provision bar impairments of contracts to which a state is a party (whether the contract was formed by statute or otherwise) as well as impairments of agreements between private citizens. *United States Trust Co. of New York* v. *New Jersey, supra; Green* v. *Biddle*, 21 U.S. 1, 91, 5 L.Ed. 547 (1823); *Dartmouth College* v. *Woodward*, 17 U.S. 518, 4 L.Ed. 629 (1819); *Fletcher* v. *Peck*, 10 U.S. 87, 137-139, 3 L.Ed. 162, 177 (1810).

"Impairment" has been defined as:

> ". . . any deviation from [the terms of the agreement], by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation." *Green* v. *Biddle, supra*, 21 U.S. at 84-85.
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> "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them, and impairment, as above noted, has been predicated of [sic] laws which without destroying contracts derogate from substantial contractual rights." *Home Building & Loan Ass'n.* v. *Blaisdell*, 290 U.S. 398, 431, 54 S. Ct. 231, 78 L.Ed. 413 (1934) (citations omitted).

In order to avoid violation of the contract clause in a private contract situation, the legislation intended to regulate

existing contractual relationships must serve a legitimate public purpose. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727, *reh. den.*, 439 U.S. 886, 99 S.Ct. 233, 58 L.Ed.2d 201 (1978); *United States Trust Co. of New York* v. *New Jersey, supra*. However, where as here, the contract is one to which the State is itself a party, and the State's impairment of that contract serves the State's own self-interest, a higher standard applies. *United States Trust Co. of New York* v. *New Jersey, supra*.

In such cases, the impairment will be sustained only if it is "reasonable and necessary to serve an important public purpose." *Id.* at 25 (emphasis added). It is not enough, when the State impairs its own contractual obligations, simply to balance the benefits of impairment to the public against the private interests of creditors against the State. For obvious reasons, this higher standard is essential to protect creditors of the State:

> "As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. *In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.* If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." 431 U.S. at 25-26 (emphasis added).
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> * * *
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> "The State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." 431 U.S. at 29.

In applying these principles, this Court held that New Jersey's repeal of the 1962 covenant to port authority bondholders violated the contract clause. New Jersey's purposes for the repeal — to encourage mass transportation and energy conservation by raising bridge and tunnel tolls and using the revenue to subsidize improved commuter railroad service — were "admittedly important." However, the 1962 covenant required such revenues to be set aside as security for outstanding bonds. This Court concluded that repeal of the covenant was not "essential" to the accomplishment of the State's goals, and identified several alternative strategies for discouraging the use of automobiles while raising revenues for mass transit. The Court concluded that the repeal was not reasonable, because "the need for mass transportation in the New York metropolitan area was not a new development, and the likelihood that publicly owned commuter railroads would produce substantial deficits was well known. . . . It was with full knowledge of these concerns that the 1962 covenant was adopted." *Id.* at 31-32.

In this case, the State's insistence that Plaintiffs comply with the requirements of the No-Fault Act — without a grace period to permit expiration of their contractual rights under the Act and without a refund of the unearned portion of the uninsured motorist fee — extinguished Plaintiffs' right to operate their uninsured vehicles and the other benefits afforded under the Act six months before these entitlements would have lapsed by operation of the Act, and effected a complete repudiation of the State's commitment to them under the Act. The State's refusal to refund the unearned portion of the fee was most certainly self-serving; the State received a windfall of one-half of the fees collected in 1973. The State violated Plaintiffs' rights under the contract clause by failing to honor its duty to refund the unearned portion of the 1973 uninsured motorist fee. The State's refusal to refund these moneys was unnecessary, unreasonable and unjustifiable.

State created contracts are property within the meaning of the Fifth and Fourteenth Amendments. *Lynch* v. *United*

States, supra. The State's non-performance, even though due to subsequent legislation, constitutes a taking of property. *Lynch* v. *United States, supra; Ward* v. *Board of Commissioners of Love County, supra; Houston T.C.R. Co.* v. *Texas, supra*. And, its refusal to refund the unearned portion of the contract consideration deems the taking to be "without compensation."

The Michigan Court of Appeals and the Circuit Court were thus correct in their finding that the Act created a contract, which is a property interest, and that the State's refusal to refund the unused portion of the fee collected under the contract constituted a taking of property without just compensation (32a-35a, 39-48a).

In addition, the State's retention of the unearned portion of the fee could be characterized as a retroactive increase — a six month contract for an annual fee. An attempt by a State to impose a retroactive fee comparable to Michigan's attempt in this case was struck down under the contract clause in *Forbes Pioneer Boat Line* v. *Board of Commissioners, supra*. In *Forbes*, the State permitted free passage through a canal and subsequently assessed a toll for prior use of the canal. Plaintiffs paid the toll and sued for a refund. The Supreme Court held that the plaintiff was entitled to a refund under the contract and due process clauses:

> "We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot [to assess a toll]." 258 U.S. at 340.

Plaintiffs paid $45 for the right to operate motor vehicles without insurance until the end of the 1973 registration year. By depriving them of that right midway through the year, the State effectively imposed a retroactive surcharge of $22.50 for the first half of the year — the precise offense condemned in *Forbes*. The State's retention of the unearned portion of the 1973 uninsured motorist fee was not merely

unnecessary; it was, under *Forbes*, a separate and independent constitutional offense.

This Court should grant *certiorari* to insure that Plaintiffs are compensated for the taking of their contract rights in violation of the Fifth Amendment.

3. THE STATE OF MICHIGAN'S APPROPRIATION TO THE GENERAL FUND OF INTEREST EARNED ON A PRIVATE TRUST FUND CONFLICTS WITH DECISIONS OF THIS COURT

The Michigan Supreme Court opinion, which ignores that the State's failure to pay interest on the $45 million loan from the Fund to the general fund is an unconstitutional taking, conflicts with decisions of this Court.[16]

Under Michigan law, the Fund was not part of the public treasury, but a special trust fund. *Bowser* v. *Jacobs*, 36 Mich. App. 320, 354, 194 N.W.2d 110 (1971). The Act specifically provided that the unappropriated moneys in the Fund shall be deposited to earn interest. Mich. Comp. Laws §257.1103(1). That interest income was required to be added to the corpus of the Fund, and thereby enhance the ability of the Fund to pay all claims and expenses, including payments on behalf of uninsured motorists, such as expenses incurred in defending them.

The statute stated:

> ". . . *The treasurer shall deposit or invest any unappropriated portion of the fund, in the same manner and subject to all provisions of law with respect to the deposit or investment of state funds by the state treasurer, and all interest earned by such portions of the fund as may be deposited or invested by the treasurer shall be collected by him and placed to the credit of the fund.* All unexpended moneys appropriated from the fund shall revert to the fund at the end of each fiscal year." Mich. Comp. Laws §257.1103(1) (emphasis added).

[16] The Michigan Supreme Court found that it was not necessary to address this interest question. 418 Mich. at 156, n. 2 (6a).

This provision was mandatory. It required the State Treasurer (who, by statute, was "custodian" of the Fund)[17] to deposit or invest any "unappropriated" portion of the Fund, and stated that interest earned thereby "shall" be collected and placed to the credit of the Fund. And, this provision created an expectancy to those contributing that the Fund would continue to earn money so that it could be used to pay costs incurred in providing benefits to them or on their behalf.

The 1971 "transfer" of $45 million from the Fund to the State's general fund, and the 1973 return of those moneys, without the payment of interest, was in complete disregard of the mandates of the Act and manifestly improper.[18] There can be no question but that the $45 million "transferred" to the general fund were "unappropriated" funds, required to be deposited or invested to earn interest. The Act by which the transfer was accomplished simply stated as follows:

> "Upon the effective date of this section, the State Treasurer is authorized to transfer the sum of $45,000,000 from the Motor Vehicle Accident Fund to the State General Fund. The State Accounting Division shall treat the transfer as revenue from other funds.
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> * * *
>
> In addition to the annual appropriations provided for in subsection (2) [installment principal payments on the loan] there shall be appropriated annually to the motor vehicle accident claims fund interest on the balance remaining payable." Mich. Comp. Laws §257.1103a(1)(3).[19]

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[17] Mich. Comp. Laws §257.1102(b).

[18] On April 17, 1976, the State again made an interest-free loan from the Fund. By virtue of 1975 Mich. Pub. Acts, No. 89, effective April 17, 1976, the State Treasurer was authorized to transfer $20 million from the Fund to the State general fund to help defray the general costs of government. The Act provided for a repayment of the loan over the next two years without interest.

[19] This provision was not amended. In 1973, the Legislature merely appropriated $45 million from the general fund to the Fund and never paid interest. 1973 Mich. Pub. Acts, No. 59, §2 (96a).

This transfer was not for a specific purpose and the legislation did not authorize a disbursement of these funds. Such a general "transfer" of funds for no specific purpose is not an appropriation. *Todd* v. *Hull*, 288 Mich. 521, 531, 285 N.W. 46 (1939); *Cummings* v. *Scranton*, 348 Pa. 538, 36 A.2d 473, 474 (1944). Therefore, it cannot be disputed that the $45 million transferred from the Fund to the State's general fund were "unappropriated" Fund moneys which, by the very Act creating the Fund, had to be invested at interest for the benefit of the Fund.

In the years 1967-1970, a major source of revenue for the Fund was interest on its unappropriated surplus:

Fiscal Year	Amount of Corpus	Interest Credited to the Fund
1967	$28,294,032.25	$ 800,646.97
1968	45,593,161.22	1,577,126.68
1969	42,909,964.64	2,683,196.58
1970	51,003,963.28	2,662,364.00
1971	54,555,937.59	236,257.70[20]
1972	55,712,717.92	299,054.33[21]

These figures establish that in 1971 and 1972 only a small portion of the Fund's corpus was earning interest, because the $45 million loaned to the general fund was "interest free."

In *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith, supra*, a Florida statute provided that interest accruing on interpleader moneys deposited with the Clerk of the Court, were deemed to be income of the Clerk's office. This Court found that "[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property" and held that the State's appropriation of the interest earned was a violation of the Fifth Amendment. 449 U.S. at 164.

[20] Interest paid on only $9,555,937.59.

[21] Interest paid on only $10,712,717.92.

Here, as in *Webb's*, the Fund was a special trust fund and not public moneys. Thus, the failure to pay interest on the loans was a violation not only of the Act itself, but also the Fifth Amendment of the United States Constitution. And, as in Webb, "neither the . . . Legislature by [an appropriation] statute, nor the . . . courts by judicial decree, may accomplish the result" the state "seeks simply by recharacterizing the principal" as a tax. 449 U.S. at 164. The simple fact is that these moneys were held in trust for the purposes of the Act — to advance Funds on Plaintiffs' behalf and provide the benefits for which Plaintiffs paid. Plaintiffs are entitled to a return of all moneys which should have been credited to the Fund and were not used to carry out its purposes.

This Court should grant *certiorari*, so that the Michigan Legislature's unconstitutional appropriation of interest earned on trust fund moneys will be returned.

CONCLUSION

This case presents the very situation for which this Court was formed — to protect citizens from unconstitutional actions of their states governments. This Court has consistently held state governmental actions such as those involved here to be violative of the Fifth Amendment of the Constitution of the United States. The state cannot transform unconstitutional actions into constitutional actions by inventing new and inconsistent characterizations of their conduct in order to accomplish the then-desired result.

The plain fact is that the State of Michigan extended Plaintiffs entitlements for the 1973 registration year and terminated these entitlements 6 months before expiration, without refunding the unused and unearned portion of the fee paid therefor. Whatever the label, such termination is violative of the Constitution of the United States, by taking of property without just compensation.

This Court should grant *certiorari* in order to address and remedy the unconstitutional acts of the State of Michigan.

Respectfully submitted,
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and
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APPENDIX

Michigan Supreme Court Order
Denying Rehearing

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 31st day of January in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

Rehearing No. 103

WILLIE BRAY, et al,
Plaintiffs-Appellees
and Cross-Appellants,

v

STATE OF MICHIGAN, et al,
Defendants-Appellants
and Cross-Appellees.

SC 65164
CoA 43329
LC 73-248-161-CZ

In this cause, a motion for rehearing is considered and, in order of the Court, it is hereby DENIED.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court

in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 1st day of February in the year of our Lord one thousand nine hundred and eighty-four.

[SEAL]

(s) Corbin R. Davis, *Clerk*

Michigan Supreme Court Opinion

STATE OF MICHIGAN
SUPREME COURT

BRAY v DEPARTMENT OF STATE

Docket No. 65164. Argued April 7, 1983 (Calendar No. 1).—Decided December 1, 1983.

BRICKLEY, J. This is the culmination of a decade of litigation involving two trips up the judicial ladder of this state. It involves the desire of the plaintiffs, a class of some 350,000 Michigan residents, to each recover half of a $45 annual fee they were required to pay in order to register their uninsured motor vehicles in 1973, the last year uninsured motorists were permitted to operate their vehicles on Michigan roads. It is their claim that having paid for a full year's "privilege of driving an uninsured motor vehicle", the inauguration of the state's mandatory no-fault insurance act on October 1, 1973, midway through the registration year, entitled them to a refund.

Following two separate hearings before the circuit court and corresponding review by the Court of Appeals, the case comes to us following a holding that: 1) the $45 annual fee for uninsured motorists provided for in the Motor Vehicle Accident Claims Act, MCL 257.1101 *et seq.*; MSA 9.2801 *et seq.*, the proceeds of which went to a fund for the benefit of the victims of accidents involving uninsured and unidentified motorists, "could be said to represent an annual insurance premium" which established a contractual relationship between the state and the uninsured motorist, a relationship that is a property right protected by the Fourteenth Amendment of the United States Constitution; 2) that the no-fault insurance act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*, terminated that contractual relationship; and 3) that the contract right impaired by the state can be redeemed by a refund of a pro rata portion of the annual $45 fee. It was the judgment of the Court of Appeals that because the pro-rata refund to which the plaintiffs were

entitled was required on constitutional grounds it should be forthcoming from the state, irrespective of the resources of the Motor Vehicle Accident Claims Fund, the repository of the contested fee.

It is our conclusion that there is no legal or factual basis for finding that the MVACA is in the nature of an insurance policy for plaintiffs or that the required fee established any contractual rights. We find that the uninsured motorist fee is more in the nature of a tax than either a license fee or an insurance premium. We find no federal or state constitutional infringement of plaintiffs' rights occasioned by the enactment of the no-fault insurance act. Therefore, there is no contractual, statutory, or constitutional basis for concluding that the state is liable to plaintiffs. The history of this case follows.

In 1965, the Legislature enacted the Motor Vehicle Accident Claims Act, 1965 PA 198. As amended, the act provided that "[e]very person registering an uninsured motor vehicle in this state shall pay annually at the time of registering, in addition to any other fee prescribed by law, a fee of $45.00". 1971 PA 19, §3(3). The act further provided that it would be a misdemeanor for anyone who had not paid the fee to drive an uninsured motor vehicle. 1971 PA 19, §3(7). Insured motorists were originally required to pay a $1 fee.[1] 1965 PA 198, §3(3).

The act provided that the proceeds of these fees would go into the Motor Vehicle Accident Claims Fund "for the payment of damages for injury to or death of certain persons or property damage", that is, persons who had the

[1] Uninsured motorists were required to pay a $25 fee by 1965 PA 198, § 3(2). The fee was raised to $35 by 1968 PA 223, § 3(2), and to $45 by 1971 PA 19, § 3(3). In 1971, the Legislature waived payment of the $1 fee by insured motorists whenever the fund had a surplus of 40% or more greater than the fund's combined gross claims and claim expense reserves. 1971 PA 19, § 3(5). The $1 insured motorist fee was not collected for the 1971, 1972, or 1973 registration years.

misfortune of being injured by uninsured, underinsured, or unidentified motorists. The Secretary of State, who was responsible for the fund, was subrogated to the rights of the injured parties as against the uninsured drivers. MCL 257.1106(4); MSA 9.2806(4). Uninsured motorists against whom there were unsatisfied judgments owing either to an injured party or the fund and with whom the Secretary of State had not been able to make a repayment arrangement were made subject to the revocation both of their driver's licenses and their automobile registrations. MCL 257.1106(6); MSA 9.2806(6).

On October 31, 1972, the no-fault act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*, was approved by the Legislature. It provided that on October 1, 1973, in addition to the introduction of the no-fault concept, all motorists must be insured and must provide evidence of insurance. MCL 500.3101, 500.3101a; MSA 24.13101, 24.13101(1).

In August of 1973, nine months after the passage of the no-fault insurance act and two months before it became operational, plaintiffs commenced this action, seeking a declaration of their rights and a refund of half of the $45 uninsured motorist's fee paid in 1973. The suit was initiated in the Court of Claims; but, by stipulation of the parties, it was moved to the Wayne Circuit Court. The some 350,000 uninsured motorists constituting the plaintiff class claimed, from the outset, that the $45 that was required to be paid the preceding March 31 was a license fee for the privilege of driving an uninsured motor vehicle, and that they paid the $45 "with the understanding and agreement" that they could continue to drive their uninsured vehicles until April 1 of the following year without the necessity of obtaining motor vehicle insurance. They aver that by adopting the no-fault insurance act and by making it operational on October 1, 1973, the state unilaterally, midway through the year, canceled what they had paid for for an entire year. Plaintiffs claim "that logic, public policy, and the legal

rights" of their class dictate a return of half of that $45 fee. They claim that the "defendants have breached the contract entered into" with the plaintiffs.

Over a year later, in November, 1974, the trial court issued what was to be only the first opinion in this case. The trial court declared the $45 payment to be a license fee and that, as such, the plaintiffs had received only half of the "protection" under the license that they had paid for, entitling them to a refund.[2] In reaching its decision, the court expressly declined to consider the various constitutional claims of plaintiffs and based its decision, apparently, on equitable principles.

In May, 1976, the Court of Appeals upheld plaintiffs' claim for a refund, but on different grounds. *Bray* v *Dep't of State*, 69 Mich App 172, 178; 244 NW2d 619 (1976). The Court found that the $45 fee did not fit "neatly into either category" of license fee or tax. It found the fee to be "unique" and "to be designed to establish a state administered insurance program similar in some respects to a private insurance program. The $45 fee thus could be said to represent an annual insurance premium paid by those who have not acquired private insurance policies." The Court then referred to MCL 500.3020; MSA 24.13020, which requires a private insurer to refund the excess portion of a premium paid by an insured when there is an interruption in the policy period. Applying the rationale that the uninsured motorist fee was, in effect, an insurance policy for the plaintiffs and that the policy period was

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[2] Plaintiffs' complaint also sought a refund of interest on monies transferred by the Legislature from the fund to the general fund. 1971 PA 19, § 3a, authorized this transfer at an interest rate "to be determined annually by the legislature". Pursuant to 1973 PA 59, § 2, the money was repaid to the fund without interest. Plaintiffs have cross-appealed from the conclusion of the trial court and the Court of Appeals that the trial court had no power to substitute its judgment as to a proper interest rate for that of the Legislature. Our conclusion on the necessity of a refund obviates a decision on this matter.

interrupted, the court held that an appropriate portion of the fee should be refunded. But, because plaintiffs were not the primary beneficiaries of the so-called insurance policy (those having a claim against an uninsured driver being the primary beneficiaries), plaintiffs were not entitled to their refund until the Motor Vehicle Accident Claims Fund had satisfied all of the claims and potential claims of the primary beneficiaries. The matter was remanded to the circuit court for further proceedings. Application for leave to appeal to this Court was denied on September 9, 1976. 397 Mich 851.

On remand, the trial court decided to consider the constitutional arguments raised in the first hearing. The court applied the theory of the Court of Appeals that a contractual relationship between plaintiffs and the state existed, as in the nature of an insurance policy. It found that this contractual relationship was impaired by the adoption of the no-fault insurance act and that the impairment violated the Contract Clauses of the United States and Michigan Constitutions, US Const, art I, § 10; Const 1963, art 1, § 10, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The court then concluded that a constitutional entitlement to the refund overrode the priority of other claimants to the fund.

The Court of Appeals affirmed the decision of the trial court, reasserting the contractual relationship and adopting the circuit court's constitutional findings to the extent that the adoption of the no-fault insurance act midway through the 1973 registration period amounted to a "taking" or diminution of a property interest. It also adopted the trial court's finding that, because the relief was constitutionally required, the right to the refund was absolute. 97 Mich App 33; 294 NW2d 236 (1980).

Leave to appeal to this Court was granted on June 8, 1981. 411 Mich 972.

We first deal with the two basic theories on which plaintiffs' relief in the lower courts was founded. The theory propounded by the plaintiffs, with great consistency in their travels through the lower courts, was that during the automobile registration year of 1973 they paid $45 as a license fee for driving an uninsured motor vehicle for 12 months. The basic theory of the lower courts was that the effect of the plaintiffs' payment of $45 was to engage the state in a contractual relationship, a relationship that was impaired by the adoption of the no-fault insurance act midway through the 1973 registration year. An analysis of each theory depends on an examination of the nature of the extraction of the $45 fee by the state from its uninsured motorists.

That examination indicates to us that the plaintiffs were clearly not buying anything, and, contrary to the Court of Appeals position that it was akin to the buying of insurance, we find nothing to indicate that plaintiffs as a class were securing any benefits. If anything, in exchange for the $45 paid under the Motor Vehicle Accident Claims Act, rather than being insured, they were made more vulnerable in the area of automobile liability. The fund that plaintiffs' fees were financing was clearly not primarily for the benefit of the uninsured motorists. Prior to 1965, those who were injured by uninsured and uncollectible drivers often found it useless to attempt to perfect their claims and secure judgments. After the passage of the MVACA, they had good reason to do so because of the possibility of collecting from the fund within the limits provided by the act. They were required to subrogate their interests to the Secretary of State, who then could pursue the uninsured motorist. The Secretary of State had a weapon that the injured motorist did not have, his ability under the MVACA to suspend both the operator's licenses and motor vehicle registrations of those against whom there were uncollected judgments and who had not entered into arrangements with the Secretary of State for repayment. The plaintiff class was clearly made

more vulnerable by the passage of the MVACA. If there were any benefits received by the plaintiff class, those benefits elude us.[3]

The Court of Appeals itself, in other decisions, has reinforced our conviction that the state had not entered into anything in the nature of an insurance contract with the plaintiffs. In *Weisberg* v *DAIIE*, 36 Mich App 513; 194 NW2d 193 (1971), the Court held that the Motor Vehicle Accident Claims Fund was not a substitute for personal insurance for uninsured motorists and, in *Abbott* v *Secretary of State*, 84 Mich App 23; 269 NW2d 292 (1978) *lv den* 406 Mich 940 (1979), it held that the Secretary of State represented the fund, not the uninsured motorists. The payment of a fee was not, in our judgment, a payment for specific services or rights and cannot be considered to have created an insurance contract. Accordingly, plaintiffs' claims under the Contract and Due Process Clauses must fail.

We next deal with the contention that the fee paid was a license fee. License fees are paid to engage in activities that the state has a right to regulate, if not prohibit. Hunting and fishing license fees, occupational fees, and driver's license fees are examples. Without paying these fees, citizens are normally precluded from the activities or the privileges licensed, and it is well-settled law in this state that the

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[3] Plaintiffs could, of course, recover from the fund for damages suffered because of the acts of other uninsured motorists. This right was granted to all persons who suffered such damage, existed independent of one's status as an uninsured motorist, and, therefore, cannot be considered a benefit giving rise to any contract rights in an uninsured motorist *qua* uninsured motorist.

This lack of an especial benefit to the uninsured motorist likewise precludes the conclusion that the uninsured motorist fee was a special assessment. An especial benefit to the assessed group is the *sine qua non* of a special assessment. See *Dukesherer Farms, Inc* v *Dep't of Agriculture (After Remand)*, 405 Mich 1; 273 NW2d 877 (1979); *Newman* v *City of Indianola*, 232 NW2d 568 (Iowa, 1975); *Heavens* v *King County Rural Library Dist*, 66 Wash 2d 558; 404 P2d 453 (1965).

amount of the fees charged must be related to the costs of the regulation. *Vernor* v *Secretary of State*, 179 Mich 157; 146 NW 338 (1914); *Merrelli* v *St Clair Shores*, 355 Mich 575; 96 NW2d 144 (1959). There is considerable authority that a claim for recovery of license fees, even in cases where they were illegally collected in the first instance, is difficult to establish. See, *e.g.*, *Beachlawn Building Corp* v *St Clair Shores*, 370 Mich 128; 121 NW2d 427 (1963). If we were to conclude that the fee was a license, it would still fall to the plaintiffs to establish a basis for a refund notwithstanding the termination of the license halfway through the license year.

The plaintiff class, prior to the enactment of the MVACA in 1965, was entitled to drive uninsured motor vehicles. There is no indication in the MVACA that the state wished to curtail driving by uninsured motorists. What the state clearly wanted to do was to raise money to solve a problem. The problem it wished to solve was the increasing number of motorists injured by uninsured and uncollectible drivers. In order to provide a fund to protect that class, money was raised from the group that caused the problem, the group represented by the plaintiff class.[4] Once it was decided to raise the money from that class, what better time and way to collect it than at the time of registering the motor vehicle? There was never a showing that there was a desire on the part of the state to regulate the uninsured motorist.

In its first opinion in this case, the Court of Appeals stated:

> "Although MVACA, on its face, appears to grant permission to uninsured motorists to drive their uninsured vehicles, it was not intended primarily as a regi-

[4] Earmarking the proceeds of a tax for a specific fund or special purpose, as is frequently the case in Michigan's scheme of taxation, rather than the general fund does not make the exaction any less a tax.

stration provision. The title of MCL 257.1101 *et seq.*; MSA 9.2801 *et seq.*, makes this clear. It states:

> "'An Act providing for the establishment, maintenance, and administration of a motor vehicle accident claims fund for the payment of damages for injury to or death of certain persons or property damage arising out of the ownership, maintenance, or use of motor vehicles in the state in certain cases and to provide penalties for violation of this act.'

"Also the fact that there is a separate statute, MCL 257.1 *et seq.*; MSA 9.1801 *et seq.*, which deals specifically with registration of motor vehicles, both insured and uninsured, indicates that MVACA was not intended as a licensing provision. This is further indicated by the fact that fees imposed under MCL 257.1 *et seq.*; MSA 9.1801 *et seq.*, which are much lower than the MVACA fee, cover licensing and administration expenses." 69 Mich App 178.

We agree. Simply because the state chose to enforce payment of the fee by suspending the licenses and registrations of the offending motorists does not transform the collection of the fee into a licensing and regulatory scheme.

We find the fee paid by plaintiffs to be in the nature of a tax.

A tax is designed to raise revenue. *Merrelli* v *St Clair Shores*, 355 Mich 575; 96 NW2d 144 (1959). As we explained in *Dukesherer Farms, Inc* v *Dep't of Agriculture (After Remand)*, 405 Mich 1, 15-16; 273 NW2d 877 (1979):

> "Exactions which are imposed primarily for public rather than private purposes are taxes. See *People ex rel the Detroit & H R Co* v *Salem Twp Board*, 20 Mich 452, 474; 4 Am Rep 400 (1870). Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed. *Knott* v *Flint*, 363 Mich 483,

499; 109 NW2d 908 (1961); *Fluckey* v *Plymouth*, 358 Mich 447, 451; 100 NW2d 486 (1960)."

The MVACA was obviously designed to raise revenue. As we have previously explained, the revenue raised by the MVACA did not inure to the benefit of the group assessed. The fund existed for the public purpose of providing certain compensation to all those persons injured by uninsured motorists. The Legislature did not, however, by taxing those who caused a problem, engage the state in any express or implied contractual or licensing arrangement. The Legislature simply chose the most appropriate group to tax. And despite plaintiff's arguments to the contrary, we find that no refund of this tax is due.

Plaintiffs argue that if the MVACA is considered a tax its collection violated the provisions of Const 1963, art 9, §3, which requires that a non-ad valorem tax be "uniform upon the class or classes on which it operates." Plaintiffs argue that after October 1, 1973, there was only one class—insureds—and that, as a result, the portion of the tax attributable to the period from October 1, 1973, to March 31, 1974, was unconstitutional.

Relying on *Goodenough* v *Dep't of Revenue*, 328 Mich 56; 43 NW2d 235 (1950), plaintiffs further argue that as of October 1, 1973, they were illegally taxed for a privilege that, in fact, no longer existed. Both of these arguments fail to recognize the nature of a tax.

The MVACA fee can only be viewed as a tax for the privilege of operating an uninsured motor vehicle. The obligation to pay a privilege tax is due on the date set by law. Events occurring after the tax liability is due, in the absence of legislative intent to the contrary, are irrelevant. See *Holland Hitch Co* v *Michigan*, 318 Mich 474; 28 NW2d 242 (1947); *Case* v *Detroit*, 129 Mich 298; 88 NW 626 (1902); *Ecorse Screw Machine Products Co* v *Michigan Corp and Securities Comm*, 1 Mich App 414; 136 NW2d 758 (1965), *aff'd* 378 Mich 415; 145 NW2d 46 (1966).

Plaintiffs were required to pay the uninsured motorist tax at the time they registered their uninsured vehicle. MCL 257.226, 257.1103(3); MSA 9.1926, 9.2803(3). 1971 PA 19, §3(3), provided: "Every person registering an uninsured motor vehicle in this state *shall pay annually at the time of registering* in addition to any other fee prescribed by law, a fee of $45.00." It did not say that, if 30 days from the registration and the payment of the fee a person were to decide to purchase insurance, he could get a refund of 11/12 of the $45 fee, nor did it say that, if a person were to purchase and register a new uninsured motor vehicle halfway through the year, he would pay only half of the $45 fee. It merely set a fee and the time and circumstances for paying the fee. We find no evidence in the act of a legislative intent to alter the basic principle that a tax is due on the date set by law and nonrefundable regardless of later events.

What evidence of a legislative intent that does exist shows that the Legislature considered and rejected the idea of refunding a portion of the uninsured motorist fee. HB 5215 (1973), which would have reconciled the MVACA with the then recently enacted no-fault act, provided for such a refund. Over strongly worded dissents, HB 5215 (1973) was passed by the House, but was never reported out of the Senate Committee on Commerce. See 4 Michigan House J (1973), pp 2882-2906; 3 Michigan Senate J (1973), p 2463. SB 1323 (1974), which was substantially similar to HB 5215 (1973) except that it made no provision for a refund, was passed by both houses and became 1974 PA 223. See 3 Michigan House J (1974), pp 2342-2343; 2 Michigan Senate J (1974), pp 1158, 1365, 1625. This history makes it clear that the Legislature intended no refund.[5]

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[5] In a footnote to their brief, plaintiffs also argue that the uninsured motorist tax violated Const 1963, art 9, §9 which, prior to its amendment by House Joint Resolution F, proposal M, ratified November 7, 1978, provided:

"All specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used

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We find *Goodenough, supra,* to be distinguishable. There, the plaintiffs, nonresident trustees of trusts having their situs in Pennsylvania, were subjected to an intangibles tax. This Court held that the plaintiffs could not be validly taxed on a privilege that they did not possess in this state. In this case, the tax was on uninsured vehicles. Plaintiffs are members of the class of persons who operated uninsured vehicles. They were not being taxed for a privilege or status they did not possess at the time of taxation.

We find the uninsured motorist fee to be in the nature of a tax. Because we have found that no contractual or licensing arrangement existed between plaintiffs and the state, plaintiffs' constitutional claims are without merit. Because there is no express or implied legislative intent to refund the fee, plaintiffs are due no refund.

Reverse.

WILLIAMS, C.J., and RYAN, CAVANAGH, and BOYLE, JJ., concurred with BRICKLEY, J.

LEVIN, J. *(dissenting).* This cause concerns a governmental exaction that is difficult to label. The circuit court and the Court of Appeals characterized the exaction

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to propel motor vehicles upon highways and on registered motor vehicles shall, after the payment of necessary collection expenses, be used exclusively for highway purposes as defined by law."

The MVACA does not define the compensation of persons injured by uninsured motorists as a highway purpose.

We need not decide whether the uninsured motorist fund falls within prior legislative definitions of highway purposes or whether the MVACA implicitly is such a definition, because plaintiffs seek only a refund. The proper relief for a validly imposed, but unconstitutionally spent, tax is to enjoin the improper spending. Plaintiffs have requested no such relief.

as a "license fee"[1] and as an "insurance premium" respectively,[2] holding in appellees' favor under both labels. Today, the majority advises appellees that they may not recover because the "uninsured motorist fee is more in the nature of a tax than either a license fee or an insurance premium".[3] Persuaded that appellees did not have an insurance contract with the state and that the $45 exaction could not have been levied validly as either a regulatory fee or as a tax, we agree with the attorney General's statement[4] that the exaction is best viewed as an assessment.

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[1] The circuit court first found that the fee represented a one-year license and that appellees were entitled to a 50% refund because their license was canceled halfway through the year. The Court of Appeals affirmed in part, reversed in part, and remanded. Stating that the exaction "could be said to represent an annual insurance premium" and noting that Michigan law provides that an insurer must refund the excess portion of the premium paid by the insured if a private insurance policy is canceled, the Court of Appeals agreed with the circuit court that appellees were entitled to a refund of $22.50 plus interest if the Fund contained enough money to provide both a refund of $22.50 plus interest to each plaintiff and payment of all legitimate claims filed by persons entitled to recover from the Fund. The Court of Appeals went on, however, to hold that appellees must wait for their refund until the MVACA's three-year statute of limitations had run and those persons harmed by uninsured vehicles had recovered. *Bray* v *Dep't of State*, 69 Mich App 172, 178-179; 244 NW2d 619 (1976).

[2] On the second trip up the judicial ladder, both the circuit court and the Court of Appeals found that appellees had suffered a taking of property without due process because the state had "effectively terminated" a valid "contract of insurance". *Bray* v *Dep't of State*, 97 Mich App 33, 42; 294 NW2d 236 (1980).

[3] *Ante*, p 154.

[4] On November 10, 1981, in oral argument before this Court, the Assistant Attorney General described the exaction as follows:

> "What we have is something completely different and I don't know why it was never picked up. It was mentioned in one of our briefs in the Court of Appeals briefly, in fact just a line. *But what it was is very clear. It was an assessment. Not a tax, but an assessment.* And keep in mind what this Court said in *Dukesherer* v *Dep't of Agriculture*, 405 Mich 1. The distinction between a tax and an assessment is that a tax is for general revenue purposes [and] can be used for anyting. *An assessment is for a very limited purpose, and it is primarily to the benefit of those who pay the assessment. That is exactly what we have here.*" (Emphasis added.)

Although somewhat dissimilar from traditional "special assessments", the exaction was levied against a specific group to meet a specific problem related to that group;[5] the exaction was not, and could not validly have been, levied against this specific group for general revenue purposes.[6] The money collected for the Motor Vehicle Accident Claims Fund (Fund), including the interest that should have been paid to the Fund on moneys borrowed by the state from the Fund, must accordingly be segregated from the general fund and used exclusively for the purpose for which it was intended. Once the purpose of the Fund has been met, any surplus remaining in the Fund, or that would have remained

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[5] As the majority notes (*ante*, p 159, fn 3) special assessments traditionally involve an especial benefit to the assessed group. The strength of the law, however, is its ability to adapt established doctrines to new fact situations. See generally Levi, *An Introduction to Legal Reasoning*, pp 1-27, 102-104. Indeed, in *Dukesherer Farms, Inc* v *Dep't of Agriculture (After Remand)*, 405 Mich 1; 273 NW2d 877 (1979) (discussed in Part IV), this Court, analogized a levy against cherry producers to provide money to promote marketing to cases concerning special assessments for street improvements, drains, and sewers, and on that basis rejected a challenge to the levy as an unconstitutional delegation of the taxing power to private persons. As set forth in Parts II and III of this opinion, the uninsured vehicle fee could not constitutionally have been levied as a regulatory fee or as a tax. Although the uninsured vehicle fee was not a traditional "special assessment" (levied for the benefit of those especially assessed) it does not follow that the incidents of such an especial exaction or assessment cannot or should not be those that attach to other valid governmental exactions, such as special assessments, that cannot constitutionally be levied as a regulatory fee or as a tax. Clearly an exaction that cannot constitutionally be levied as a regulatory fee or as a tax should not be called a tax because it is not a traditional "special assessment".

[6] One can agree with the majority that "[e]armarking the proceeds of a tax for a special fund or special purpose * * * rather than the general fund does not make the exaction any less a tax", (*ante*, p 161, fn 4), without agreeing with its conclusions. As set forth in Part III of this opinion, the uninsured vehicle fee could not constitutionally have been levied as a tax. Even if the fee exacted would have been constitutional as a tax, money earmarked for a specific purpose may be required to be kept in a separate fund and may not be transferable to the general fund. See *State ex rel Masterson* v *Ohio State Racing Comm*, 97 Ohio App 108; 124 NE2d 786 (1954); *McGraw* v *Hansberger*, _____ W Va _____; 301 SE2d 848, 857-858 (1983); 81A CJS, States, §228, pp 797-799.

had the interest due the Fund been paid, should, absent legislation providing for an enlargement of the benefits consistent with the purpose of the Fund, be refunded to those assessed to create the Fund.

I

We agree with the majority's conclusion that there is no legal or factual basis for holding that the Motor Vehicle Accident Claims Act provides liability insurance for the appellees or that the required fee established any contractual rights.[7] Although the MVACA provided benefits to the victims of uninsured motorists akin to those provided by insurance, it was not an insurance program from the standpoint of the uninsured motorist. Uninsured motorists remained primarily liable for their torts without regard to whether the $45 annual fee had been paid and were legally responsible to reimburse the Fund fully for claims that the Fund paid on their behalf. The Secretary of State had no duty to defend uninsured motorists. Unlike insurance contracts,[8] the MVACA did not provide for one party protecting another party from loss arising from named risks in return for the payment of consideration.

II

We also agree with the majority that although the authority of the state under the police power to require automobile registration is unquestioned, the exaction at issue could not have been levied validly as a regulatory fee.[9] In *Vernor* v *Secretary of State*, 179 Mich 157, 164,

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[7] *Ante*, p 154.

[8] See 1 Couch, Insurance (2d ed), §1.2, pp 28-29.

[9] *Ante*, p 160.

Appellees contend that they paid a $45 license fee on April 1, 1973, for the privilege of driving uninsured for one year and, on the authority of cases requiring a pro-rata refund where a license is canceled before the

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170; 146 NW 338 (1914), this Court held that a motor vehicle registration fee in excess of the cost of registering and identifying motor vehicles must be construed as a tax. *Vernor* states that the Legislature may not use the police power as a "guise or subterfuge" to enact revenue-raising measures. Subsequent decisions of this Court have followed *Vernor*, reaffirming that regulatory fees cannot exceed the cost of the special services required by the regulation. See, *e.g.*, *Checker Cab Co* v *Romulus Twp*, 371 Mich 232; 123 NW2d 772 (1963) (township ordinance licensing and regulating the use of taxicabs held invalid as an exercise of the police power because the revenues raised far exceeded the cost of administration and enforcement); *Merrelli* v *St Clair Shores*, 355 Mich 575; 96 NW2d 144 (1959) (fees for building permits found to be revenue-raising measure because they exceeded the costs of building inspection). As the title of MCL 257.1101 *et seq.*; MSA 9.2801 *et seq.*, makes clear, the money collected for the Motor Vehicle Accident Claims

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licensing year ends, that because the privilege was terminated midyear they are entitled to a refund of $22.50. Elsewhere in this opinion we state why this governmental exaction cannot be sustained as a regulatory fee or tax, but is valid as an assessment. Further, even if appellees did purchase for $45 a license conferring the privilege of driving uninsured, the license and privilege was not terminated midyear when the no-fault automobile liability act went into effect. The period for which such a license and privilege was granted was shortened *before* it began when the no-fault automobile liability act, requiring all motorists to be insured on October 1, 1973, was enacted as 1972 PA 294 and approved by the Governor on October 31, 1972. The effect of the shortening of the period for which such a license and privilege was granted was to increase the fee required to be paid annually at the time of registration of an uninsured motor vehicle to $45 for the six-month period ending September 30, 1973. (The words "for the 1966 registration year, and for each year thereafter" were eliminated by 1971 PA 19.)

The power, purpose, and intent of the Legislature to assess owners of uninsured vehicles in such amounts as was thought necessary to provide adequate money to pay the benefits mandated by the MVACA is clear. As set forth in Parts VII and VIII, to the extent the money collected exceeds the needs of the Fund, such excess should be refunded to those from whom it was excessively enacted.

Fund was not intended to be used for regulatory purposes.[10]

There is no meaningful difference between insured and uninsured motorists in terms of the costs to the state of regulating their driving. Accordingly, a regulatory scheme charging owners of uninsured vehicles a $45 fee and owners of insured vehicles a $1 fee for the privilege of driving[11] would not have been valid.

III

We do not agree, however, with the majority's characterization of this exaction as a tax. Characterizing this exaction as a tax places the MVACA in conflict with two provisions of the Michigan Constitution. This exaction from owners of uninsured vehicles, which could not have been levied validly as a regulatory fee, also could not have been levied validly as a tax.

Before its amendment in 1978, article 9, §9 of the 1963 Michigan Constitution provided that

> "[a]ll specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon high-

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[10] The title, in relevant part, states:

> "An Act providing for the establishment, maintenance and administration of a motor vehicle accident claims fund for the payment of damages for injury to or death of certain persons or property damage arising out of the ownership, maintenance or use of motor vehicles in the state in certain cases".

[11] The owners of uninsured vehicles were first required to contribute $25 (1965 PA 198)—raised to $35 by 1965 PA 389, and to $45 by 1971 PA 19—to the Fund annually, and until at least 1971 (see 1971 PA 19) the owners of insured vehicles were required to contribute $1 annually. MCL 257.1103; MSA 9.2803. Because more owners of insured vehicles contributed than did owners of uninsured vehicles, it appears that contributions from owners of insured vehicles aggregated approximately one-quarter of the total amount paid into the Fund over the years the fees were collected.

> ways and on registered motor vehicles shall, after the payment of necessary collection expenses, be used *exclusively for highway purposes as defined by law.*" (Emphasis supplied.)

The Legislature did not "define" as a "highway purpose" the payment of benefits to the victims of accidents caused by uninsured motorists. Even if it had, it is questionable that the persons who proposed and voted for this constitutional limitation intended the phrase "highway purposes" to have a meaning so collateral to the construction and maintenance of highways and bridges.[12] A tax on the registration of uninsured vehicles to provide funds for the victims

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[12] In *Advisory Opinion on Constitutionality of 1976 PA 295, 1976 PA 297*, 401 Mich 686, 705-707; 259 NW2d 129 (1977), this Court indicated that the words "as defined by law" gave the Legislature a substantial amount of flexibility in defining the term "highway purposes". The "as defined by law" language does not, however, confer on the Legislature unlimited power of definition.

In 1978, art 9, §9 was amended to read:

> "All specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and to propel aircraft and on registered motor vehicles and aircraft shall, after the payment of necessary collection expenses, be used exclusively for transportation purposes as set forth in this section.
>
> "Not less than 90 percent of the specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and on registered motor vehicles shall, after the payment of necessary collection expenses, be used exclusively for the transportation purposes of planning, administering, constructing, reconstructing, financing, and maintaining state, county, city, and village roads, streets, and bridges designed primarily for the use of motor vehicles using tires, and reasonable appurtenances to those state, county, city, and village roads, streets, and bridges.
>
> "The balance * * * shall be used exclusively for the transportation purposes of comprehensive transportation purposes as defined by law."

The new language makes even more doutbful the validity of the use of a specific tax on registered motor vehicles to pay benefits to the victims of uninsured motorists.

of uninsured motorists cannot be sustained consistent with art 9, §9 of the Michigan Constitution.

The majority intimates in a footnote that this exaction might conflict with Const 1963, art 9, §9 if viewed as a tax, but argues that the issue need not be addressed because appellees have not sought the proper relief for a validly imposed but unconstitutionally spent tax.[13] That argument pre-supposes, however, that the exaction in question would have been validly imposed had the funds been used for traditional highway purposes; that is not the case. Article 9, §3 of the Michigan Constitution provides that a tax other than an ad valorem tax must be "uniform upon the class or classes on which it operates". A registration tax for traditional highway purposes charging some owners a $45 fee and others a $1 fee would violate that constitutional provision. For the foregoing reasons, the MVACA exaction could not have been levied constitutionally as a tax.[14]

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[13] *Ante*, p 164, fn 5.

[14] The majority appears to expect ominiscience from appellees by requiring them to know that a majority of this Court would characterize this exaction as a tax. Considering that this exaction would have been imposed unconstitutionally had it been a tax and that the Attorney General has several times rejected the notion that this exaction was a tax, initially expressing the opinion that this exaction could only be constitutional as a regulatory fee (letter of December 8, 1970, from the Attorney General to the Chairman of the Committee on Appropriations), and most recently expressing the view that this exaction was an assessment, see fn 4, it is understandable that appellees believed some relief other than injunction to be appropriate.

Ordinarily, the proper procedure for challenging an invalidly imposed tax or assessment is to pay the tax or assessment under protest and to commence an action for a refund. Protest is not always required, however. For example, when a tax or assessment collected is in excess of the proper amount because of a mutual mistake of fact, or if a tax or assessment is paid under duress, no protest is required. In the instant case, appellees could not have known that the assessment was excessive until the purpose of the Fund was met and a surplus remained. Their suit for a refund was both timely and appropriate when filed.

IV

Special assessments of specific groups to provide revenue for the benefit of specific persons or property are not considered to be "taxes" for the purposes of state constitutional limitations. *Dukesherer Farms, Inc* v *Dep't of Agriculture (After Remand)*, 405 Mich 1; 273 NW2d 877 (1979); *Wikman* v *City of Novi*, 413 Mich 617, 634, fn 9, 683, fn 59; 322 NW2d 103 (1982); *Newman* v *City of Indianola*, 232 NW2d 568 (Iowa, 1975); *Heavens* v *King County Rural Library Dist*, 66 Wash 2d 558; 404 P2d 453 (1965); Hellerstein & Hellerstein, *State and Local Taxation* (4th ed), pp 43-44. In *Dukesherer Farms*, this Court held that the Agricultural Commodities Marketing Act, MCL 290.651 *et seq.*; MSA 12.94(21) *et seq.*, imposed an "assessment" rather than a "tax" because the funds came from producers directly affected by the marketing program and were required to be disbursed solely for necessary expenses incurred by the marketing program. Concluding that the special assessment was not an unconstitutional use of the taxing power, this Court, quoting a decision of the United States Supreme Court, said:

> "It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. *A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another.* We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation." (Emphasis supplied.) *Dukesherer Farms*, pp 19-20, quoting *United States* v *Butler*, 297 US 1, 61; 56 S Ct 312; 80 L Ed 477 (1936).

Like *Dukesherer Farms*, this case involves an assessment to raise money to cover a particular need that has a sufficient nexus with the persons assessed to justify the imposition. If collected as an assessment, this exaction was valid.

V

It is a maxim of statutory construction that an act of a legislature should not be construed to be invalid if another construction is available. *NLRB* v *Catholic Bishop of Chicago*, 440 US 490, 500; 99 S Ct 1313; 59 L Ed 2d 533 (1979); *Kent* v *Dulles*, 357 US 116, 129-130; 78 S Ct 1113; 2 L Ed 2d 204 (1958); Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U Chi L Rev 800, 814-816 (1983) (suggesting that construing statutes to avoid unconstitutionality is the only canon of statutory interpretation that has merit). Because the exaction from owners of uninsured vehicles could have been validly collected as an assessment, but not as either a regulatory fee or as a tax, we would hold that the exaction was a variety of special assessment.

VI

Unlike general revenue-raising measures, special assessments create special funds designed to be used for a specific purpose. As this Court noted in *Dukesherer Farms*, *supra*, p 20 "the spending of sums acquired through assessment must be rigidly defined and the money collected must be segregated from all other accounts". See also *City of Searcy* v *Headlee*, 222 Ark 719; 262 SW2d 288 (1953); *Bourland* v *Southard*, 185 Ark 627; 48 SW2d 555 (1932); *Ochs* v *Town of Hot Sulphur Springs*, 158 Colo 456; 407 P2d 677 (1965); *People ex rel Drobnick* v *City of Waukegan*, 1 Ill 2d 456; 116 NE2d 365 (1953); *Campbell* v *Village of Green Tree*, 59 NM 255; 282 P2d 1101 (1955); *Chicago R I & P R Co* v *Stephens County Excise Bd*, 165 Okla 188; 25 P2d 70 (1933); *Brookings* v *Associated Developers, Inc*, 280

NW2d 97 (SD, 1979); *McGraw* v *Hansbarger*, ___ W Va ___; 301 SE2d 848, 857-858 (1983); 81A CJS, States, § 228, p 798; 42 Am Jur, Public Funds, § 79; 14 McQuillan, Municipal Corporations (3d ed), § 38.336, p 731. Accordingly, the state had a duty to segregate the Fund for the victims of uninsured motorists and to ensure that the money in the Fund was not transferred to the state's general fund. The state disregarded that duty in 1971 when the Legislature transferred accumulated assets of the Fund to the state's general fund.[15]

In addition to having a duty to segregate the Fund from the general fund, the state had a duty to ensure that the Fund earned interest on the monies collected for the Fund.[16] It is well established that money collected by virtue of a special assessment constitutes a trust fund and that the governmental body collecting the assessment is the trustee of the fund. See, *e.g.*, *Fidelity Trust Co* v *Village of Stickney*, 129 F2d 506 (CA 7, 1942); *Willard* v *City and County of Honolulu*, 323 F Supp 666 (DC Hawaii, 1971); *State ex rel Taylor* v *Robison*, 59 Idaho 485, 491; 83 P2d 983 (1938); *Sampson* v *Village of Stickney*, 24 Ill 2d 134; 180 NE2d 457 (1962); *People ex rel Drobnick*, *supra*; *People ex rel Anderson* v *Village of Bradley*, 367 Ill 301; 11 NE2d 415 (1937); *Lesser* v *Village of Mundelein*, 36 Ill App 3d 433; 344 NE2d 29 (1975); *Village of Dolton* v *Harms*, 327 Ill App 107; 63 NE2d 785 (1945); *Lynn* v *City of Longview*, 15 Wash 2d 528; 131 P2d 164 (1942). It is also "well established that conduct of the Government as a trustee is measured by the same standards applicable to private trustees". *Manchester Band of Pomo Indians, Inc* v *United States*, 363 F Supp 1238, 1245 (ND Cal, 1973). A trustee

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[15] 1971 PA 19.

[16] The MVACA provided that the unappropriated moneys in the Fund be deposited to earn interest. 1971 PA 19, § 3(1); 1971 PA 63, § 3(1); MCL 257.1103; MSA 9.2803. Over $2.5 million in interest was credited to the Fund in each of fiscal years 1969 and 1970, but, after the borrowing, by the state, less than 10% of those amounts was credited in fiscal year 1971.

who borrows from a trust fund must pay interest. *Langford* v *Shamburger*, 392 F2d 939 (CA 5, 1968). The failure of the state to pay interest to the Fund on the money transferred from the Fund to the state's general fund was a violation of the state's fiduciary duty.[17] To allow the state to borrow money from a trust fund raised by a special assessment of a discrete group of persons without the payment of interest would enable it to do indirectly what it cannot do directly—to enlarge the general fund at the expense of the trust. It would subject the members of the discrete group to further assessment necessitated by a shortfall of funds resulting from the state's use of money belonging to the trust fund without the payment of interest. It appears that if the Fund had received the interest to which it was entitled, it might currently have a surplus after providing for liabilities.

VII

In situations involving land improvements, when the purpose of a special assessment has been met and money remains in the special fund, the excess belongs to the persons who have contributed to the fund in proportion to the amount of their original contribution. *Chicago R I & P R Co* v *Stephens County Excise Bd*, 165 Okla 188; 25 P2d 70 (1933); *Miller* v *City of Seattle*, 50 Wash 252, 254-255; 97 P 55 (1908).[18] McQuillan, *supra*, § 38.336, p 731, writes:

> "Landowners paying special assessments to a fund to pay bonds issued to cover the actual cost and ex-

[17] The Legislature originally promised to pay interest on the money that it borrowed, 1971 PA 19, § 3a, but subsequently deleted the subsection providing for interest, 1976 PA 89, § 3a. MCL 257.1103a; MSA 9.2803(1).

[18] Refunds from excessive special assessments have been provided for in legislation. See, *e.g.*, *Wylie* v *City Comm of Grand Rapids*, 293 Mich 571; 292 NW 668 (1940); *Smith* v *City Comm of Grand Rapids*, 281 Mich 235; 274 NW 776 (1937); *Blanchard* v *Detroit*, 253 Mich 491; 235 NW 230 (1931); *Thayer* v *Grand Rapids*, 82 Mich 298; 46 NW 228 (1890). Although the Legislature has not provided for a refund of the surplus of this assessment, that does not mean that appellees are not entitled to such relief; a court of equity may grant a refund. As this Court said in *Blanchard*, p 495, "in the absence of statutory provision to the contrary, [the surplus from a special assessment] may be recovered, although there is no express statutory provision therefor".

pense of the improvement in excess of the sum required, due to miscalculation or mistake, are, in equity, justly entitled to have such excess refunded to them, each landowner to receive the excess paid by him, that is, the excess should be prorated among the property owners, as it may appear that each has paid. Such money, when collected from the several property owners becomes a trust fund, to be used only for the purpose specified, and when the bonds and interest and other legal expenses chargeable against such fund have been satisfied, the balance belongs to the landowners. Each lot or parcel of land in the improvement district must bear its equal share in the total cost and no more."

Admittedly, the Motor Vehicle Accident Claims Fund is somewhat different than a fund set aside for a specific land improvement because the purpose of the Fund is less well defined and those being assessed are not the direct beneficiaries. The Legislature may, as it did,[19] enlarge the benefits or the time limits respecting the Fund as long as it devotes the money to purposes consistent with those for which the money was exacted. Although the question is not before us, it may even be that the persons to be benefited by the creation of the Fund could claim the right to have a court apply the Fund to the purposes sought to be served by its establishment. Absent such a claim by such persons, or such a determination by the Legislature, the money that would be in the Fund but for the state's failure to pay interest must be returned to the class or classes of persons from whom it was excessively exacted.

VIII

Because at this time it is unclear how much surplus will remain in the Fund after its purpose has been met and the money owed to it as interest has been paid, we would

[19] Although the no-fault automobile liability act went into effect on October 1, 1973, by virtue of 1974 PA 223 the Fund remained liable for damages arising out of accidents involving uninsured vehicles that occurred before July 26, 1974. 1975 PA 322 extended until January 2, 1976, the benefits of the act for certain actions.

remand for proceedings consistent with this opinion. If after calculating the interest owed and making provision for the benefits remaining to be paid, the circuit court finds that the Fund has a surplus, such surplus should be refunded to those from whom it was collected.

IX

In conclusion, this cause concerns a governmental exaction that cannot be readily pigeonholed as a regulatory fee, a specific tax, or an assessment. Because it could not have been levied validly either as a regulatory fee or as a tax, and because it was an assessment of a specific group to meet a specific problem related to that group, we conclude that this exaction from owners of uninsured and insured vehicles was an assessment. As an assessment, it was validly levied, but the money exacted cannot be placed in the general fund. Absent claims by the beneficiaries of this trust fund, the monies in the Fund, including the interest that is due the Fund, less an amount equal to the liabilities of the Fund, should be refunded to those from whom it was collected.

Although no member of the appellee class would receive a large sum as a result of appellees' success in this action, recognition of appellees' rights today would prevent the state from unconstitutionally appropriating to the general fund money excessively exacted from a discrete group of persons. The power to assess, like the power to tax, "involves the power to destroy".[20] When the Attorney General defends the action of the state, it is a function of the private bar and civil litigation to hold that power in check.

We would remand for further proceedings consistent with this opinion.

KAVANAGH, J., concurred with LEVIN, J.

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[20] *M'Culloch* v *Maryland*, 17 US (4 Wheat) 316, 431; 4 L Ed 579 (1819).

STATE OF MICHIGAN
COURT OF APPEALS

WILLIE BRAY, LORENE DAVID, RANDOLPH WIGGINS, JOAN COLBURN, MARY ROE, JOHN DOE, and all other members of the Class,
Plaintiffs-Appellees,

v No. 43329

STATE OF MICHIGAN: WILLIAM G. MILLIKEN, Governor of the State of Michigan; MICHIGAN DEPARTMENT OF STATE, RICHARD H. AUSTIN, Secretary of State; MOTOR VEHICLE ACCIDENT CLAIMS FUNDS DIVISION: LAWRENCE A. CARROLL, Director of the Motor Vehicle Accident Claims Fund; ALLISON GREEN, State Treasurer; DEPARTMENT OF COMMERCE—INSURANCE BUREAU: DANIEL J. DEMLOW, Commissioner of Insurance,
Defendants-Appellants.

(Entered April 22, 1980)

Before: T. M. Burns, P.J., Bashara and Kaufman, JJ.
BASHARA, J.

This case makes its second appearance before our Court. Plaintiffs initiated the present class action to obtain a refund of one-half of the 1973 fee paid pursuant to the Motor Vehicle Accident Claims Act, MCL 257.1101 *et seq.*; MSA 9.2801 *et seq.* (hereinafter referred to as MVACA). Payment of the fee entitled plaintiffs, who were uninsured motorists, to drive for a twelve-month period ending April 1, 1974. However, as of October 1, 1973, all Michigan motorists were required to purchase no-fault automobile insurance. MCL 500.3101; MSA 24.13101. Plaintiffs claim

that the No-Fault Act vitiated their rights under the MVACA.

Plaintiffs alleged both constitutional and non-constitutional grounds for recovery. The trial court refused to consider the constitutional claims since, in its opinion, the case could be decided according to state law. The circuit court determined that the fee represented a license and that plaintiffs were entitled to a 50% refund. The court ordered an amount equal to the refund placed in escrow pending final resolution of the case.

This Court affirmed the lower court, but held that the fee was in the nature of an insurance premium rather than a license. *Bray* v *Michigan Department of State*, 69 Mich App 172; 244 NW2d 619 (1976), *lv den* 397 Mich 851 (1976). The Court further ruled that the class of individuals harmed by uninsured vehicles had priority in receiving payment from the Motor Vehicle Accident Claims Fund, MCL 257.1103; MSA 9.2803 (hereinafter referred to as MVACF). The partial fee refunds to which plaintiffs were entitled were subordinated to the claims of that class.

The Court noted that at the time of the decision, the three-year statute of limitations of the MVACA (MCL 257.1118; MSA 9.2818) had not yet run. As such, the Court was unable to determine whether the fund's reserve was sufficient to satisfy the claims of both the plaintiffs and persons harmed by uninsured motorists. Accordingly, the case was "remanded for further proceedings not inconsistent with this opinion." *Bray, supra*, at 182.

On July 22, 1977, the circuit court entered an amended final order in compliance with this Court's opinion. The lower court further ordered that plaintiffs would be permitted to renew their constitutional claims, since they had not previously been considered. The constitutional issues were decided against defendants and an immediate refund ordered. The refund was to be paid from the State's general fund without regard to the solvency of the MVACF. Defendants appeal from this decision.

Michigan Court of Appeals Second Opinion

Defendants first argue that the circuit court was without power to decide the constitutional issues. It is claimed that the lower court disregarded the law of the case and violated the doctrine of *res judicata*.

A lower court on remand may "take such action as law and justice requires so long as it is not inconsistent with the judgment of the appellate court." *Sokel* v *Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959), *Meyering* v *Russell*, 85 Mich App 547, 552; 272 NW2d 131 (1978).

Defendants contend that the trial court's order mandating an immediate refund is inconsistent with this Court's holding that the plaintiffs be subordinated to other claimants of the MVACF. This argument ignores the fact that the remedy provided by the Court of Appeals was based on a different cause of action. It is the cause of action and not the remedy which must not be inconsistent.

Plaintiffs' constitutional claims were expressly not considered by the trial court nor by this Court on appeal.

Defendants nevertheless maintain that *res judicata* acts as a bar to such consideration.

The doctrine of *res judicata* is defined in *Curry* v *Detroit*, 394 Mich 327, 332; 231 NW2d 57 (1975), quoting *Tucker* v *Rohrback*, 13 Mich 73 (1864), as follows:

> "A judgment to constitute a bar to a claim in a subsequent action must be rendered upon the merits, upon the matter in issue and between the same parties or their privies."

In determining the issue of whether a matter must have been actually litigated, the *Curry* Court, quoting *Gursten* v *Kenny*, 375 Mich 330; 134 NW2d 764 (1965), stated:

> "The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and

pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

We find that the present action is not barred by *res judicata*. The constitutional claims which formed the basis of the present action were not litigated because there existed an independent state law ground for the holding. This is in conformity with the rule that a "court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwinder* v *Tennessee Valley Authority*, 297 US 208, 347; 56 S Ct 466; 80 L Ed 688 (1936) (Brandeis, J. concurring).

Having determined that the constitutional issues were properly before the court, we must next decide whether any of plaintiffs' constitutional rights were violated.

Plaintiffs contend that the right to register and drive their vehicles between October 1, 1973 and April 1, 1974 was a property interest entitled to protection under both the "Due Process" and "Taking" clauses of the Fifth Amendment to the Constitution. U.S. Const, Amend V, Amend XIV.

Specifically plaintiffs argue that the termination of their rights under the MVACA was a deprivation of property without due process of law, and a taking for public use without just compensation. U.S. Const, Amend V, Amend XIV.

In reviewing the No-Fault Act, our Supreme Court recently recognized that all motorists have a significant property interest in being able to register and operate a motor vehicle. *Shavers* v *Attorney General*, 402 Mich 554,

559; 267 NW2d 72 (1978), *cert den* _____ US _____ (1979):

> "In Michigan the independent mobility provided by an automobile is a crucial, practical necessity; it is undeniable that whether or not a person can obtain a driver's license or register and operate his motor vehicle profoundly affects important aspects of his day-to-day life."

Moreover, we are bound by our previous conclusions in *Bray* v *Department of State*, *supra*, insofar as they affect our analysis of the issues then under consideration. *Taines* v *Munson*, 42 Mich App 256, 259; 201 NW2d 685 (1972). In *Bray I*, this Court after concluding that the $45 fee was neither a license fee or tax said:

> "The $45 fee thus could be said to represent an annual insurance premium paid by those who have not acquired private insurance policies." *Bray*, *supra*, at 178.

An insurance policy is contractual in nature and contracts are certainly within the purview of the Fifth Amendment. *Lynch* v *United States*, 292 US 571; 54 S Ct 840; 78 L Ed 1437 (1933), *Houston T.C.R. Co* v *Texas*, 170 US 243; 18 S Ct 610; 42 L Ed 1023 (1898).

The *Lynch* Court's analysis of the problem, applied to the federal government, is closely akin to the issue presented in the present case:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v Central Pacific R Co, 118 US 235, 238, 6 S Ct 1038, 30 L Ed 173; United States v Northern Pacific Ry

Co, 256 US 51, 64, 67, 41 S Ct 439, 65 L Ed 825. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power." 292 US at p 579. (Footnotes omitted.)

Similarly, Justice Adams, speaking for a unanimous Michigan Supreme Court in *Buckeye Ins Co* v *Michigan*, 383 Mich 630, 642; 178 NW2d 476 (1970), quoted with approval from *Pearsall* v *Board of Supervisors of Eaton County*, 74 Mich 558, 561, 562; 42 NW2d 77 (1889):

" ' "A partial destruction or diminution in value is a taking." Mills, Em. Dom. § 30; *Pumpelly* v *Green Bay Company* (1871), 80 US (13 Wall) 166, 177 (20 L Ed 557); *Cushman* v *Smith* (1852), 34 Me 247; *Grand Rapids Booming Company* v *Jarvis* (1874), 30 Mich 308.

" 'If the public take any action which becomes necessary to subserve public use, and valuable rights of an individual are thereby interfered with, and damaged or destroyed, he is entitled to the compensation which the constitution gives therefor, and such damage or destruction must be regarded as a "taking." ' "

Justice Adams went on to state for the *Buckeye* Court:

"This Court has applied the constitutional restriction to a variety of takings; for example, to situations of trespass from flooding waters escaping from artificial reservoirs, *Ashley* v *City of Port Huron* (1877), 35 Mich 296; *Herro* v *Chippewa County Road Commissioners* (1962), 368 Mich 263; to a violation of building restric-

tions on private property by a city in undertaking to erect a fire station, *Allen* v *City of Detroit* (1911), 167 Mich 464; and to a city's abortive condemnation proceedings for urban renewal, ultimately abandoned after ten years, *In re Urban Renewal, Elmwood Park Project* (1965), 376 Mich 311.

"Courts of other states have applied similar provisions in their state constitutions to factual situations corresponding to those of this case."

When the No-Fault Act became effective on October 1, 1973, plaintiffs' "contract of insurance" with the state was effectively terminated. The contract rights taken by the State are represented by the "premium" for the unexpired portion of the contract which was determined to be $22.50. That money was previously placed in the MVACF and used to recompense members of the public injured by uninsured motorists.

Having decided that plaintiffs had a property interest which was taken by the State, we must now determine whether there was just compensation for the taking.

In our previous decision in this case, we held, as a matter of state law, that plaintiffs had a right to a refund from the MVACF, but only after other claims against the fund were first satisfied. It now appears that the MVACF is inadequate to satisfy both groups of claimants, thereby leaving plaintiffs a right without a remedy.

In *Hayes* v *U of M Regents*, 53 Mich App 605, 611-612; 220 NW2d 91 (1974), this Court denied the plaintiffs a constitutionally compelled refund because the funds sought had already been budgeted and disbursed. The Supreme Court peremptorily reversed, indicating that prior disbursement was not a sufficient justification to deny a constitutionally compelled remedy. *Hayes* v *U of M Regents*, 393 Mich 756; 223 NW2d 276 (1975). See also, *Ward* v *Board of Commissioners of Love County*, 253 US 17; 40 S Ct 491; 64 L Ed 751 (1920).

We conclude that plaintiffs are entitled to a refund wihtout regard to the solvency of the MVACF. In light of this conclusion, it is unnecessary to address plaintiffs' other constitutional arguments.

Affirmed. No costs, a public question involved.

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

WILLIE BRAY, et al.,
Plaintiffs,

vs.

STATE OF MICHIGAN, et al.,
Defendants.

Civil Action
No. 73-248161-CZ and all
other consolidated actions.

OPINION

(Entered September 21, 1978)

The original complaint in this case was filed August 28, 1973. On September 24, 1973, this Court issued an order confirming the class and providing for notice to class members. Notice was given pursuant to the order and all similar actions were consolidated. On August 12, 1974, plaintiffs filed a motion for partial summary judgment, and on November 25, 1974, this Court held that the $45 fee paid by each plaintiff was a license fee and not a tax as claimed by defendant, and each plaintiff was accordingly entitled to a refund of $22.50, plus interest, with the advent of the No-Fault Act on September 30, 1973. The Court further held it lacked jurisdiction to question the Michigan Legislature's failure to pay interest on a forty-five million dollar loan from the Uninsured Motorists Fund, and ordered the state to escrow monies sufficient to cover the ordered refunds.

A claim of appeal was filed, and on May 27, 1976, the Court of Appeals issued its decision, affirming this Court in part, reversing in part, and remanding for further proceedings. See *Bray* v. *Department of State*, 69 Mich. App. 172 (1976).

The Court of Appeals reversed this Court's holding that the MVACA fee was a license and held that the $45.00 fee could be said to represent an annual insurance premium paid by those who had not acquired private insurance policies. The Court of Appeals agreed with this Court that plaintiffs were entitled to a refund of $22.50, because each member of the class had paid for rights under the Uninsured Motorists Act that they never received. The Court of Appeals reasoned that the state must do no less than a private insurer, which is required by MCLA 500.3020 to refund the excess portion of a premium paid by the insured if the insurer cancels the policy.

The Court of Appeals further reversed this Court's order for the escrowing of funds with which to make that refund. The Court reasoned that plaintiffs were merely secondary beneficiaries of the fund and their rights were subordinate to the rights of persons seeking compensation from the fund for injuries caused by uninsured motorists. It held that only after all claims by persons so injured have been paid and satisfied could the plaintiffs have any right to compensation from the fund. Leave to Appeal was denied by the Supreme Court from the decision of the Court of Appeals.

On July 22, 1977, this Court issued an order modifying its final judgment of July 3, 1975, pursuant to the Court of Appeals' opinion. This modified order required defendants to pay plaintiffs the amounts set forth in the final judgment, with interest at such time as this Court determines that adequate reserves exist to satisfy plaintiffs' legitimate claims. The Court further ordered the setting aside of the order for the escrowing of funds, and allowed plaintiffs to file a renewed or amended motion for summary judgment on the various constitutional claims which this Court expressly refrained from considering in its opinion and judgment of January 3, 1975. The present motion for summary judgment is filed to bring before the Court these constitutional claims.

Michigan Circuit Court Opinion On Remand

The first question raised is whether this Court can consider the various constitutional claims made by plaintiffs in their amended motion for summary judgment. In reaching its decision, on November 25, 1974, this Court held:

> "In reaching the decision, the Court does not consider the various constitutional claims of plaintiffs, nor does it consider whether Article IX, Section 9, of the Michigan Constitution, was violated."

In its order modifying final judgment of January 3, 1975, entered on July 22, 1977, this Court specifically stated:

> "It is further ordered that since this Court did not consider the various constitutional claims asserted by the plaintiffs in their amended complaint . . . and therefore the Court of Appeals did not consider these issues, this cause is remanded to this Circuit Court for determination of these issues. Plaintiffs shall have 60 days from the date of this order to renew or amend their motion for summary judgment with respect to these issues."

This order was not appealed by defendants.

In opposing the Court's consideration of these matters, the defendants argue that the Court of Appeals did not remand the matter to this Court for consideration of constitutional issues and nothing in the Court of Appeals opinion suggests or implies that the determination of consitutional [sic] issues were to be undertaken by this Court on remand.

In its opinion the Court of Appeals did not consider any of the constitutional issues raised here, and remanded the case to this Court for further proceedings not inconsistent with its opinion. It therefore appears clear that the Court of Appeals did not preclude this Court from considering the constitutional issues raised by plaintiffs. Its specific order remanded the case for further action not inconsistent with its opinion.

Plaintiffs have never had their constitutional claims determined because of this Court's refusal to reach these issues in its earlier opinion. Nothing in the opinion of the Court of Appeals precludes this Court from considering constitutional issues which the plaintiffs have a right to have considered. They should be determined here in this Court, so that if there is another appeal, the Court of Appeals will have before it the decision of this Court on the constitutional issues raised. Further, no appeal was taken from this Court's order of July 22, 1977, allowing the constitutional issues to be considered. Therefore the constitutional issues raised by plaintiffs are properly before this Court and the Court will proceed to consider them.

This action is a class action on behalf of approximately 350,000 people who in 1973, pursuant to the Motor Vehicle Accident Claims Act, paid an annual fee of $45.00, required by the state, to register and obtain 1973 license plates for uninsured motor vehicles. The expiration date of the plates on which the $45.00 was paid was March 31, 1974. In 1973, however, plaintiffs' right to use the roads as uninsured motorists was terminated by the enactment of Michigan's No-Fault Insurance Act, MCLA 500.3101, et seq., which required everyone to purchase motor vehicle insurance as of October 1, 1973. Thus plaintiffs were deprived of their right to drive as uninsured motorists six months after they had paid in full for the right to drive as uninsured motorists for the full year. The suit seeks a refund of $22.50 for each member of the class for the six months period in which they were not allowed to drive as uninsured motorists. Further details of the action may be found in this Court's prior opinion and the opinion of the Court of Appeals in 69 Mich. App. 172 (1976).

Plaintiffs contend that by terminating their rights as uninsured motorists under the act midway through the 1973 registration year without refunding the corresponding portion of the uninsured motorist fee, the defendants impaired their contractual obligations in violation of the Contracts

Clause, Article I, Section 10, of the U.S. Constitution, and Article I, Section 10, of the Michigan Constitution of 1963, providing that no law impairing the obligation of contract shall be enacted.

The contract clause of the Federal Constitution bars statutory impairments of contracts to which a state is a party, as well as impairment of agreements between private citizens. See *Fletcher* v. *Peck*, 6 Cranch 87, 3 L Ed 162 (1810); *Dartmouth College* v. *Woodward*, 4 Wheat 518, 4 L Ed 629 (1819); *Green* v. *Biddle*, 21 U. S. 1, 5 L Ed 547 (1823) and *Thompson* v. *Auditor General*, 261 Mich. 624 (1953).

Further, the obligation of contract is impaired by any law which renders a contract invalid, or releases or extinguishes rights thereunder. See *Home Building and Loan Association* v. *Blaisdel*, 290 U. S. 398, 78 L Ed 413 (1934).

The most recent discussion of the subject is found in *United States Trust Company of New York* v. *State of New Jersey*, ____ U.S. ____, 52 L Ed 2d 92 (1977). There, the states of New York and New Jersey, which had previously established the Port Authority of New York and New Jersey to effectuate a federal coordination of facilities of commerce in the Port of New York, entered into a statutory covenant in 1962 authorizing port authority involvement in a construction project and the acquisiton of a railroad, whereby the two states agreed with each other and with the holders' bonds which the Port Authority had previously issued, that so long as any of such bonds remain outstanding and unpaid and the holders had not given their consent, neither of the states nor the Port Authority would use, for other than permitted purposes, any revenues or reserves which were then, or in the future might be, pledged as security for such bonds.

Both states passed legislation, effective in 1973, rendering the 1962 covenant inapplicable with respect to bonds

issued by the Port Authority after such effective date. In 1974 both states enacted legislation which repealed the 1962 covenant outright.

A trustee and a holder of port authority bonds brought action challenging the constitutionality of New Jersey's 1974 repealing legislation. The New Jersey courts ruled that the statutory repeal was a reasonable exercise of New Jersey's police power not prohibited under the contract clause of the U. S. Constitution or the New Jersey Constitution.

The Supreme Court of the United States reversed, holding that the 1974 New Jersey law violated the contract clause of the United States Constitution, since outright repeal of the 1962 covenant impaired a contractual obligation of the state, having eliminated an important security provision which was a purely financial obligation, and since such impairment, allegedly justified as necessary for implementing the state's plan for encouraging private automobile users to shift to public transportation, was neither necessary to the achievement of the state's plan, nor reasonable in light of the circumstances.

The case recognized that the test to be used for evaluating the state's obligation of contract is less stringent than that used in evaluating impairment of private contracts. A contractual obligation undertaken by a state undermining the proper exercise of its police power is invalid ab initio under the reserve powers doctrine. In addition, a reasonableness test may be considered. Discussing these matters, the court said at page 112 of 52 L Ed 2d:

> ". . . Complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."

And further at page 114, the Court stated:

> ". . . A State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors. We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State."

The *United States Trust Company* provides a standard for judging the validity of the state's impairment of its own contractual obligations. The test for the validity of such statutory impairment is that the impairment must be reasonable and necessary to serve an important public purpose, that no less drastic impairment be available, and that the necessity for the impairment was unforeseeable at the time the obligation was assumed.

Another significant case dealing with the impairment of contracts as well as due process in *Lynch* v. *United States*, 292 U. S. 571; 78 L Ed 1434 (1933). There, plaintiffs were beneficiaries under a policy for yearly renewable term insurance issued during the first World War pursuit to the War Risk Insurance Act of October 16, 1917. In each case, before September 1, 1919, and while the policy was in force, the insured had been totally and permanently disabled. After the death of each plaintiff, a claim for payment of death benefits was filed for the beneficiary of each insured and that claim was refused. The basis for the refusal to pay was a subsequent statute (the Economy Act) which provided:

> ". . . All laws granting or pertaining to yearly renewable term insurance are hereby repealed . . ."

The District Courts and the Court of Appeals sustained demurrers to the complaints and the Supreme Court of the United States reversed. The Court relied both upon the Due

Process Clause of the Fifth Amendment and the Contracts Clause. The Court said on page 579:

> ". . . Valid contracts are property whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment . . . When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned."

Further, on page 580, the Court said:

> ". . . Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditures, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality of a citizen' . . .
>
> " '. . . Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened . . .' "

Although the Court pointed out that a less stringent rule prevails with respect to contracts of sovereigns, it nevertheless found that the action of the Contress [sic] had impaired the obligation of contract and denied plaintiffs due process.

In its opinion, the Court of Appeals recognized the contractual nature of the MVACA fee, and specifically held that the portion of the $45.00 fee covering the time between October 1, 1973, and the effective date of the No-Fault Act,

March 31, 1974, should be refunded. It therefore implicitly recognized the existence of a contract, although it did not reach the constitutional issue.

It is clear that the state entered into a contract with the plaintiffs. Not only is the statute clear on that point but the Court of Appeals' opinion emphasizes that. The contract was to provide insurance for one year in exchange for a $45.00 fee, with the understanding that, if the Motor Accident Vehicle Claims Fund were required to pay for injuries suffered, the insured would reimburse it for such payment. There is no question but what the plaintiffs paid $45.00 for insurance protection for a period of one year.

With the advent of the No-Fault Act, the plaintiffs did not receive the insurance coverage they paid for and were required to purchase private insurance. It is therefore clear that the plaintiffs did not receive the contractual benefits for which they paid.

The question then becomes whether the action of the state in failing to provide for the refund of the six-month premium was reasonable and justified under the police power.

No question is raised here as to the constitutionality of the No-Fault Statute. No question is raised here as to the authority of the Legislature to adopt the Act, and the Supreme Court in *Shavers* v. *Attorney General*, 402 Mich. 554 (1978) held that the statute would remain in effect for 18 months, pending a determination by the Legislature and the Insurance Commissioner as to the fairness of rates and pending determination as to how to control such rates. The state had the right to enact the No-Fault Insurance Act and to terminate the rights of the parties under the Motor Vehicle Accident Claims Fund.

The test to determine whether there was a reasonable basis for refusal to pay the refund under the Contract

Clause, and whether there has been a proper exercise of the police power rests on whether the failure to repay was necessary to the achievement of the State's plan and reasonable in light of all the circumstances.

First, it should be noted that the Legislature took no action with reference to the balance of the $45.00 fee. When it enacted the No-Fault Act (MCLA 500.3101), it made no provision for refund of the $22.50. In fact, it did not consider that payment at all in its enactment. Obviously, there can be no challenge of the State's termination of the rights of plaintiffs under the Uninsured Motorist Act, for no individual has a vested right to the continuance of an existing law. It therefore follows that there was no determination by the Legislature that the retention of the $22.50 was necessary under the State police power or required for other legitimate State purposes. In fact, the failure of the Legislature to speak on the subject is a clear indication that the retention of the $22.50 was not necessary to the achievement of the State's plan to transfer to a No-Fault Insurance program. It therefore appears that there is no showing of necessity or reasonableness to modify the strict rule against impairment of contract.

Plaintiffs paid $45.00 for a contract of insurance providing the coverages outlined for one year. Plaintiffs received coverage for only six months because of the enactment of the No-Fault Insurance Statute. Plaintiffs had entered into a contract with the state for a period of one year and the state through its repeal of the statute and the enactment of no-fault with no provision for a refund of sums paid for coverage that was taken away impaired that contractual right. It therefore follows that plaintiffs are constitutionally entitled to a return of the $22.50 which they paid.

Once it has been determined that the plaintiffs are constitutionally entitled to their refund, the state is absolutely obligated to pay it without regard to the solvency of

the fund, and it is irrelevent whether all the claims against the fund have not yet been filed or the fund's solvency has not been presently determined. The constitutional right against impairment of contract overrides questions of solvency of the funds and priority of claims.

In making this determination, the Court is well aware of the holding of the Court of Appeals in this case, but feels free to make such determination, for the reasons stated before.

In addition, valid contracts are property and as such are protected from being taken without just compensation under the Due Process Clauses of the Fourteenth Amendment and the Fifth Amendment. This was clearly pointed out in *Lynch*, supra. It is clear that defendants have a constitutional obligation to repay plaintiffs promptly and without regard to the solvency of the Uninsured Motorists Fund. The Court of Appeals has already held that plaintiffs are entitled to a refund under state law, and in view of the constitutional determinations made in this opinion, the Due Process Clause requires expeditious payment of that refund.

A case directly on point is *Ward* v. *Board of Commissioners of Love County*, 253 U. S. 17, 64 L Ed 751 (1919). This was a suit brought by a group of Indians seeking a refund of property taxes which had been levied against their land. The taxes were levied by the county following Congress's repeal of a 21-year property tax exemption ten years after its enactment, that is, 11 years before the exemption would have expired according to its terms. Plaintiffs paid the taxes under protest and then brought suit challenging their constitutionality. The Supreme Court held the repealing act unconstitutional under the Fifth Amendment but the county nevertheless continued to levy and collect the tax. When the case came before the Supreme Court for the second time, the county interposed as a defense that it had paid over an undetermined portion of the tax revenues to

the state, so that it no longer had the funds which were to be refunded to the plaintiffs.

The Supreme Court held that the taxes, having been collected unlawfully pursuant to an invalid act of Congress, must be refunded, and that it was immaterial that the county no longer possessed all of the funds collected. The Court pointed out (page 24 of 253 U. S.):

> "As a payment was not voluntary, . . . no statutory authority was essential to enable or require the county to refund the money. It is a well settled ruled that 'money got through imposition' may be recovered back; and as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' . . . To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law . . .
>
> "If it be true . . . that a portion of the taxes was paid over, after collection, to the state and other municipal bodies, we regard it as certain that this did not alter the county's liability to the claimants. The county had no right to collect the money, and it took the same with notice that the rights of all who were to share in the taxes were disputed by these claimants, and were being contested in the pending suits. In these circumstances, it could not lessen its liability by paying over a portion of the money to others whose rights it knew were disputed and were no better than its own . . . In legal contemplation it received the money for the use and benefits of the claimants, and should respond to them accordingly."

It is therefore clear that plaintiffs have a Fourteenth Amendment due process right to a refund, regardless of whether the state still possesses in the fund the monies which must be refunded.

The Court of Appeals held that plaintiffs did not have any right to their refund from monies in the fund until the claims of individuals harmed by uninsured motor vehicles had been satisfied. In reaching this conclusion, the Court did not consider the constitutional claims of plaintiffs.

In this opinion, the constitutional claims of plaintiffs have been considered, and it is clear that unless a refund is ordered, the obligation of the state's contract has been impaired, and plaintiffs have been deprived of their property without due process under the Fourteenth Amendment. The solvency of the fund is irrelevant in light of the constitutional validity of plaintiffs' claims.

The Court having determined that the plaintiffs are constitutionally entitled to a refund because of the Contract Clause and the Due Process Clause of the Fourteenth Amendment, it is not necessary to consider the other constitutional claims of plaintiffs.

Plaintiffs may present a judgment directing immediate payment by the State Treasurer of a refund of one-half of the fee paid under the Motor Vehicle Accident Claims Act of $22.50 each. No costs will be assessed, a public question being involved.

/s/ Horace W. Gilmore
Horace W. Gilmore
Circuit Judge

Detroit, Michigan

Michigan Circuit Court
Summary Judgment on Remand

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

WILLIE BRAY, et al.,
Plaintiffs,

vs.

STATE OF MICHIGAN, et al.,
Defendants.

Civil Action
No. 73-248161-CZ and all
other consolidated actions.

SUMMARY JUDGMENT

At a session of said Court held in the City-County Building, Detroit, Wayne County, Michigan on Jan 26, 1979.

Present: The Honorable Horace W. Gilmore
Circuit Court Judge

The Court having entered an Order dated July 22, 1977 Modifying its Final Judgment of January 3, 1975 pursuant to the Court of Appeals' Opinion, and said Order having stated that this cause of action was remanded to the Circuit Court for determination of the various constitutional claims asserted by Plaintiffs which had theretofore not been considered nor decided by either this Court or the Court of Appeals and Plaintiffs having filed a Second Amended Complaint in accordance with the leave granted and thereafter having filed an Amended Motion for Summary Judgment on said constitutional issues and a Brief in Support thereof, and Defendants having filed an Answer and Brief in Opposition thereto and oral arguments of counsels having been heard and the Court having taken the matter under advisement and having issued a written Opinion dated September 21, 1978 which is incorporated herein by reference, and Defendants having filed Objections to the proposed Judg-

ment and having moved to limit the Plaintiff Class, and the Court having held a hearing on Defendants' Objections and motion and having noted that this Court entered an Order dated September 24, 1973 confirming the Class action which Defendants' attorney approved in form and substance and this Court being otherwise duly advised in the premises,

IT IS HEREBY ORDERED AND ADJUDGED that this Court has jurisdiction to determine the constitutional issues asserted by Plaintiffs in their Second Amended Complaint and Amended Motion for Summary Judgment and/or Declaratory Relief.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs are constitutionally entitled to an immediate refund and that Judgment is granted in favor of Plaintiffs and against Defendant State of Michigan in the amount set forth below and the Treasurer of the State of Michigan is ordered to pay to Plaintiffs that pro-rata portion of the respective fee paid by each Plaintiff and member of Plaintiff Class to Defendants as the MVACA fee for the 1973 registration year, said pro-rata portion being $45.00 x number of months in 1973 registration year from and after October 1, 1973 divided by 12 (which pro-rata portion shall not exceed $22.50 per each member of Plaintiff Class), together with interest thereon at the rate of six (6%) percent per annum from October 1, 1973 until said judgment is paid in full; said principal amount owing to Plaintiffs, pursuant to the Report of Examination of the Michigan Motor Vehicle Accident Claims Fund as of June 30, 1974 published by Defendants, not to exceed the sum of Six Million Six Hundred Thirteen Thousand Nine Hundred Forty Eight and 69/100ths ($6,613,948.69) Dollars.

IT IS FURTHER ORDERED that this Judgment is against the Defendant State of Michigan and is not limited to the assets of the Michigan Vehicle Accident Claims Fund for the reason that this Court finds that it was the State of Michigan that unconstitutionally deprived Plaintiffs of their

property without just compensation and impaired their contract rights, and violated their right of due process.

IT IS FURTHER ORDERED AND ADJUDGED that as to any individual member of the Plaintiff Class for whom the Defendant State of Michigan can prove (said Defendant having the burden of proof) that a claim was paid by Defendants for an accident occurring between October 1, 1973 and March 31, 1974 in which said individual Plaintiff was an uninsured motorist, Defendant shall be entitled to set off the unreimbursed amount of said claim against the refund due to said individual Plaintiff under the terms of this Judgment.

The above provision shall not prejudice any rights of Defendant State of Michigan (including the right of set off) which said Defendant (having the burden of proof) may have against an uninsured motorist for claims paid by Defendants for accidents occurring during any other period of time.

Except as modified herein, this Court's Final Judgment of January 3, 1975, as modified by this Court's Order dated July 22, 1977, is affirmed in its every respect.

/s/ Horace W. Gilmore
Horace W. Gilmore
Circuit Court Judge

A TRUE COPY
JAMES R. KILLEEN
Clerk

By /s/ James R. Killeen
Deputy Clerk

APPROVED AS TO FORM ONLY:

/s/ Regina Ann King
Regina Ann King (P26388)
Attorney for Defendants

Michigan Circuit Court Order
Modifying Judgment On Remand

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

WILLIE BRAY, et al.,
Plaintiff-Appellants,
vs.
STATE OF MICHIGAN, et al.,
Defendant-Appellees.

Wayne County
Circuit Court
No. 73-248161CZ

ORDER MODIFYING FINAL JUDGMENT OF JANUARY 3, 1975 PURSUANT TO COURT OF APPEAL'S OPINION

At a session of said Court held in the City-County Building, Detroit, Wayne County, Michigan, on July 22, 1977.

Present: Honorable Horace W. Gilmore
Circuit Court Judge

This Court having entered a Final Judgment in this cause on January 3, 1975, and Plaintiffs having appealed that portion of said Judgment dismissing with prejudice certain claims of Plaintiffs and Defendants having cross-appealed those portions of said Judgment adverse to them, and the Court of Appeals having issued its Opinion dated May 27, 1976, and Plaintiffs' Application for Leave to Appeal to the Michigan Supreme Court having been denied, and the parties being desirous of entering an Order Modifying this Court's Final Judgment of January 3, 1975 in accordance with the Court of Appeals' Opinion in this cause, and this Court being duly advised in the premises,

IT IS HEREBY ORDERED AND ADJUDGED that the Defendants pay to Plaintiffs the amount set forth in this

Court's Final Judgment of January 3, 1975, together with interest at the rate of six (6%) percent per annum until said Judgment is paid in full, payment to be made at such time as this Court determines that adequate monies and/or reserves or other adequate provisions exist to satisfy the legitimate claims timely filed and allowed by individuals harmed by uninsured motorists and/or uninsured vehicles against the Motor Vehicle Accident Claims Fund.

IT IS FURTHER ORDERED that since this Court did not consider the various constitutional claims asserted by Plaintiffs in their Amended Complaint nor whether Article IX, Section 9 of the Michigan Constitution was violated in rendering its Opinion and Final Judgment, dated January 3, 1975, and, therefore, the Court of Appeals did not consider these issues, this cause is remanded to this Circuit Court for a determination of these issues. Plaintiffs shall have sixty days from the date of this Order to renew or amend their Motion for Summary Judgment with respect to these issues.

IT IS FURTHER ORDERED that the order for stay of proceedings pending decision of the Supreme Court dated June 11, 1976, be and is hereby set aside and held for naught.

IS IS FURTHER ORDERED that a portion of the order of judgment entered January 3, 1975 that provides as follows:

> "IT IS HEREBY ORDERED that during the pendency of the within proceedings and until the further order of this Court, that one-half (1/2) of the annual fee paid by each member of this class comprising the plaintiffs, to-wit: $22.50, plus interest thereon at the rate of six (6%) percent from October 1, 1973, shall be forthwith deposited in a special escrow account or accounts with the State of Michigan or in a commercial bank or banks which shall be separate and distinct from any other

account of the State of Michigan maintained or created under the Motor Vehicle Accident Claims Act, as amended, and said funds shall not be comingled with any other funds of the State of Michigan or with any funds of the Motor Vehicle Accident Claims Act.

IT IS FURTHER ORDERED that except as herein provided, no withdrawals whatsoever shall be made from said special escrow account or accounts until the further order of this Court.";

be and hereby is set aside and held for naught in accordance with the Opinion of the Court of Appeals dated May 27, 1976.

IT IS FURTHER ORDERED that monies held in escrow pursuant to the aforesaid judgment may be released to the Motor Vehicle Accident Claims Fund to be used for purposes intended, pursuant to 1965 PA 198, as amended, MSA 9.2801, et seq.; MCLA 257.1101, et seq.

Except as modified herein, this Court's Final Judgment of January 3, 1975 is affirmed in its every respect.

/s/ Horace W. Gilmore
Circuit Court Judge

A true copy, James R. Killeen, *Clerk*

By /s/ R. Bershaw
R. Bershaw

7-22-77
approved as to form only
/s/ Carl K. Carlson
Carl K. Carlson
Asst Atty Gen
Atty for Defendants.

STATE OF MICHIGAN
COURT OF APPEALS

WILLIE BRAY, LORENE DAVIS, RANDOLPH WIGGINS, JOAN COLBURN, MARY ROE, JOHN DOE, and all other members of the class,

Plaintiffs-Appellants and Cross-Appellees,

v

Docket #22790

STATE OF MICHIGAN, WILLIAM G. MILLIKEN, GOVERNOR OF THE STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF STATE, RICHARD H. AUSTIN, SECRETARY OF STATE, MOTOR VEHICLE ACCIDENT CLAIMS FUND, DIVISION, LAWRENCE CARROLL, DIRECTOR OF THE MOTOR VEHICLE ACCIDENT CLAIMS FUND, ALLISON GREEN, STATE TREASURER; DEPARTMENT OF COMMERCE-INSURANCE BUREAU; RUSSELL E. VANHOOSER, COMMISSIONER OF INSURANCE,

Defendants-Appellees and Cross-Appellants.

(Filed May 27, 1976)

Before: Lesinski, C.J., and J.H. Gillis and Allen, JJ.

J. H. GILLIS, J.

This is an appeal from a class action filed in Wayne County Circuit Court in August, 1973. Plaintiffs are the class of approximately 350,000 uninsured motorists who, pursuant to the Motor Vehicle Accident Claims Act, MCLA 257.1101 *et seq.*; MSA 9.2801 *et seq.*, (hereinafter referred to as MVACA), paid $45 in order to register their uninsured motor vehicles and receive 1973 license plates. Prior to

1973, payment under MVACA of the annual $45 fee entitled the uninsured motorist to drive his uninsured vehicle until April 1 of the following year. In 1973, however, the No-Fault Insurance Act, MCLA 500.3101; MSA 24.13101, became operative. That act required all motorists other than motorcycle owners to carry no-fault insurance as of October 1, 1973. Thus, in 1973, payment of the annual $45 fee entitled the uninsured motorist to legally drive his uninsured vehicle only until October 1, 1973. After that date, he needed no-fault insurance in order to legally operate his vehicle.

In their complaint, plaintiffs sought refunds of one-half of the 1973 uninsured motorist fees paid into the Motor Vehicle Accident Claims Fund (hereinafter referred to as the Fund), $22.50 per person, plus interest thereon. Also, in addition to the fee refunds, plaintiffs sought to recover from the Fund the fee money contained therein that was not needed to satisfy claims against the Fund. Furthermore, plaintiffs requested the trial court both to determine a commercially reasonable amount of interest on $45,000,000 transferred by the Legislature from the Fund to the general fund and later repaid, without interest, to the Fund and to order payment of that interest to the Fund.

In August, 1974, plaintiffs filed a motion for partial summary judgment and/or declaratory relief. In a written opinion, the trial judge determined that the $45 fee was an annual license fee paid by uninsured motorists for the privilege of operating their uninsured vehicles. Because the No-Fault Insurance Act required all motorists to carry no-fault insurance as of October 1, 1973, he concluded that the uninsured motorists who paid the 1973 $45 fee received only one-half the protection for which they paid. Consequently, he held that they were each entitled to a refund of one-half the fee paid, plus interest. The trial judge did not, however, decide the remaining issues in plaintiffs' favor. He denied plaintiffs' request for a refund of the surplus money in the Fund, explaining that many claims are still pending against

it and many more can still be filed against it because MVACA contains a 3-year statute of limitations (MCLA 257.1118; MSA 9.2818). Concluding, therefore, that he could not determine whether the Fund contained surplus monies, he dismissed that count of plaintiffs' complaint without prejudice.

In addition, he determined that payment of interest on the monies transferred between the Fund and the general fund is a legislative function with which courts cannot interfere. Consequently, he held that the court lacked jurisdiction to order payment to the Fund of a commercially reasonable amount of interest on the $45,000,000 and thus granted summary judgment under GCR 1963, 117.3 to defendants on that issue.

Then, pursuant to a motion by plaintiffs, the trial judge ordered defendants to segregate and deposit in an escrow account, until final disposition of the case, the monies he had ordered refunded plus interest at the rate of six percent from October 1, 1973.

Plaintiffs now appeal as a matter of right, arguing only that the trial court erred in granting summary judgment to defendants on the issue of payment to the Fund of a commercially reasonable amount of interest on the $45,000,000 transferred between the Fund and the general fund. They do not appeal the trial court's dismissal of their request for a refund of any surplus monies in the Fund.

Defendants cross appeal, claiming that the trial court erred in granting plaintiffs a refund of one-half of the 1973 fee money plus interest. They argue, too, that the court erred in ordering defendants to segregate and deposit in an escrow account the fee money plus interest at the rate of six percent from October 1, 1973. We will discuss the arguments seriatim.

I

Did the trial court err in granting summary judgment to defendants on the issue of payment to the Fund of a commercially reasonable amount of interest on the $45,000,000?

We believe plainitffs are precluded from raising their argument because they lack standing. A party who fails to allege that he or she has been injured lacks standing. *Inglis* v *Public School Employees Retirement Board*, 374 Mich 10; 130 NW2d 892 (1964). In *Inglis, supra*, plaintiff, a retiree, sought to compel defendants, the retirement board, to follow one statute rather than another in determining the amount of money to be transferred from the school aid fund to the retirement fund. Because plaintiff alleged neither that the benefits to be paid to her as a retiree would be adversely affected nor that her retirement allowance was in arrears, the Court concluded that she had not attempted to show any injury to herself and, therefore, lacked standing. The case at bar is strikingly similar to *Inglis, supra*. Plaintiffs in the instant case initially alleged injury by pleading that they were entitled to the surplus monies in the Fund. But, the trial court dismissed that aspect of their action, and plaintiffs have not appealed from that dismissal. Thus, they no longer claim any interest in the Fund beyond that regarding refund of one-half of the 1973 fee money. Consequently, they have failed to allege injury, and, therefore, lack standing to raise the interest issue.

II

Did the trial court err in granting plainiffs a refund of one-half of the 1973 fee money plus interest?

The trial court and the parties approached this issue by examining whether the $45 fee constituted a license fee or a tax. We do not believe it fits neatly into either category. A tax is designed to raise revenue. *Merrelli* v *St. Clair Shores*,

355 Mich 575; 96 NW2d 144 (1959). The $45 fee was not assessed for that purpose. A license, on the other hand, is a grant of permission to do something. A licensing provision will be upheld only if it is primarily intended as a police regulation rather than a revenue raising measure. Any money collected pursuant to a licensing statute must be proportionate to the cost of issuing the license and regulating the business to which it applies. *Vernor* v *Secretary of State*, 179 Mich 157; 146 NW 338 (1914), *Merrelli, supra*. Although MVACA, on its fact, appears to grant permission to uninsured motorists to drive their uninsured vehicles, it was not intended primarily as a registration provision. The title of MCLA 257.1101 *et seq.*; MSA 9.2801 *et seq.*, makes this clear. It states:

> "An Act providing for the establishment, maintenance and administration of a motor vehicle accident claims fund for the payment of damages for injury to or death of certain persons or property damage arising out of the ownership, maintenance or use of motor vehicles in the state in certain cases; and to provide penalties for violation of this act."

Also, the fact that there is a separate statute, MCLA 257.1 *et seq.*; MSA 9.1801 *et seq.*, which deals specifically with registration of motor vehicles, both insured and uninsured, indicates that MVACA was not intended as a licensing provision. This is further indicated by the fact that the fees imposed under MCLA 257.1 *et seq.*, MSA 9.1801 *et seq.* which are much lower than the MVACA fee, cover licensing and administration expenses. Thus, the MVACA provisions do not fit under either of the traditionally invoked labels. Instead, they are unique. They seem to be designed to establish a state administered insurance program similar in some respects to a private insurance program. The $45 fee thus could be said to represent an annual insurance premium paid by those who have not acquired private insurance policies. If a private insurance policy is cancelled, MCLA 500.3020; MSA 24.13020, requires the insurer to

refund the excess portion of the premium paid by the insured. Because the MVACA fee is similar to an insurance premium, we believe the policy of MCLA 500.3020; MSA 24.13020 applies, and that portion of the $45 fee covering the time between October 1, 1973, the date the No-Fault Act became operative, and March 31, 1974, the end of the fee year, should be refunded.

If the Fund clearly contained sufficient funds to provide for both refund of $22.50 plus interest to each plaintiff and payment of all legitimate claims filed by individuals entitled to recovery from the Fund, we would order immediate refund of the $22.50 plus interest to each plaintiff. But, at this juncture, we cannot determine whether the Fund contains enough money to satisfy the claims of both the plaintiffs and those harmed by uninsured motorists. This is so because MVACA's three-year statute of limitations has not yet run and, as a result, many claims have been and still might be filed against the Fund.

Consequently, we must determine which class of claimants, the uninsured motorists or the individuals harmed by uninsured vehicles, has priority in receiving payment from the Fund. We believe the class of individuals intended by the Legislature to be the primary beneficiaries of the Fund must be given priority in recovering from it. Once that class's claims have been entirely paid, the secondary beneficiaries should be entitled to recovery.

We believe the Legislature intended those harmed by uninsured vehicles to be the primary beneficiaries of the Fund. The previously described language of MVACA's title, which states that the act provides for the maintenance of a fund for paying damages for harm caused by certain vehicles, supports that interpretation. MCLA 257.1106(4); MSA 9.2806(4), and MCLA 257.1106(5); MSA 9.2806(5), also support it. They provide:

> "Where an amount is paid out of the fund under this section, the secretary is subrogated to the rights of the

person to whom the amount is paid and may maintain an action in his own name or in the name of the person against the person responsible for the use or operation of the uninsured motor vehicle.

"Where payment is made under this section, the operator's or chauffeur's license and owner's registration or registrations of the persons to whom the notice was forwarded under this section shall be forthwith suspended by the secretary and shall not be reinstated until such person or persons have:

"(a) Repaid in full to the fund the amount paid out; or

"(b) Commenced installment repayments in accordance with an agreement made with the secretary, and filed proof of financial responsibility until the amount paid out in settlement of the claim by the motor vehicle accident claims fund has been repaid in full."

By imposing a reimbursement requirement, those provisions indicate that uninsured motorists, in actuality, gained no protection from the Fund and, thus, were not intended as the primary beneficiaries of MVACA. They thereby suggest, instead, that those individuals damaged by uninsured vehicles were intended as the major beneficiaries of MVACA.

Case law, too, indicates that individuals harmed by uninsured motorists were intended as the primary beneficiaries of MVACA. *Lisee* v *Secretary of State*, 388 Mich 32, 44; 199 NW2d 188 (1972), explained:

"The purpose of the Legislature in passing the Motor Vehicle Accident Claims Act was to compensate those persons who were injured as a result of the negligent operation of a motor vehicle by an uninsured person."

Weisberg v *Detroit Automobile Inter-Insurance Exchange*, 36 Mich App 513; 194 NW2d 193 (1971), indicates that uninsured motorists were not intended as primary beneficiaries of MVACA. That case held that the owner of an uninsured vehicle injured while a passenger therein cannot recover from the Fund. The *Weisberg* Court explained:

> "Analysis of § 6 of the act imparts to us that the Legislature never intended to authorize a monetary recovery by an owner of an uninsured motor vehicle for damages caused by *that same vehicle*, since under § 6(5) the secretary is required—in every case—to suspend the license and registration of such owner until the monies received from the fund are repaid or arrangements therefor are made. It is a logical contradiction that a claimant could first receive payment from the fund and then have his license and registration suspended until he repays the fund." 36 Mich App at 522.

That Court drew support from the fact that the Ontario courts, in interpreting the Ontario act, which was the model for our own act, concluded that an owner of an uninsured motor vehicle cannot recover from the Ontario fund for damage to his own vehicle.

Thus, because MVACA was primarily oriented toward benefiting those harmed by uninsured vehicles, we believe those individuals' claims must be satisfied before the uninsured motorists receive partial fee refunds.

III

Did the trial court err in ordering defendant to segregate and deposit in an escrow account the fee money plus interest at the rate of six percent from October 1, 1973?

Because the uninsured motorists cannot receive fee refunds unless and until all claims of individuals harmed by uninsured motor vehicles have been satisfied, they do not,

at this point, have any right to the monies in the fund. Consequently, we hold that the trial judge erred in ordering defendant to segregate and deposit the fee money plus interest in an escrow account.

Affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this opinion. No costs, a public question being involved.

Judge Lesinski did not participate.

Michigan Circuit Court First Judgment

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

WILLIE BRAY, ET AL,
Plaintiffs,

vs.

STATE OF MICHIGAN, ET AL.
Defendants.

Civil Action
No. 73-248161-CZ and all
other consolidated actions

FINAL JUDGMENT

At a session of said Court held in the City-County Building, Detroit, Wayne County, Michigan on January 3, 1975

PRESENT: Honorable Horace W. Gilmore
Circuit Judge

Plaintiffs filed their complaint and amended complaint and Defendants filed answers thereto. Plaintiffs filed written interrogatories and Defendants filed answers thereto. Plaintiffs thereafter filed a motion for partial summary judgment and/or declaratory judgment, and said motion was brought on for hearing in open Court and Crane and Ellman by Harry S. Ellman and Barris, Sott, Denn & Driker by Donald E. Barris, of counsel, argued on behalf of Plaintiffs, and Frank J. Kelley, Attorney General, by Carl K. Carlsen, Assistant Attorney General, argued on behalf of the Defendants. This Court, after giving careful consideration to the pleadings, answers to the interrogatories, briefs, counter briefs and exhibits attached thereto and after hearing extensive legal argument of counsel filed its written opinion on November 25, 1974.

NOW, THEREFORE, it is hereby ordered that the Plaintiffs, the class of uninsured motorists who paid the annually requisite fee of Forty-Five ($45.00) Dollars pursuant to the Motor Vehicle Accident Claims Act in order to register their uninsured motor vehicles to obtain 1973 Michigan license plates, or in order to avoid penalty of law for the reason that their motor vehicles insurance lapsed, expired, cancelled, or that the company with whom they were insured became insolvent or bankrupt, are each entitled to, and the Defendants are hereby ordered to pay each of said parties a refund for the reasons set forth in the opinion of this Court heretofore filed in this cause, which reasons are incorporated herein by reference thereto, of one-half (1/2) of the fee paid, to-wit: Twenty-Two and 50/100 ($22.50) Dollars plus interest at the rate of six (6%) percent per annum commencing from October 1, 1973 until said sum is paid into the special escrow account or accounts as hereafter established and Plaintiffs shall receive such additional interest so earned by said escrow account(s) as determined by this Court.

IT IS FURTHER ORDERED that the Plaintiffs have failed as a matter of law to sustain the allegations of Count V and Count VI of their amended complaint for the reasons set forth in the opinion of this Court heretofore filed in this cause, which reasons are incorporated herein by reference thereto, and that the Plaintiffs are not entitled to relief in that the Forty-Five Million ($45,000,000.00) Dollars transferred from the Uninsured Motorists Fund to the State General Fund was done pursuant to a legislative act, and this Court has no jurisdiction to order payment of interest on said fund so transferred. In accordance with GCR 1963 117.3 the Defendants are granted a summary judgment against the Plaintiffs on Count V of Plaintiffs' amended complaint.

IT IS FURTHER ORDERED that Plaintiffs' claim that the Motor Vehicle Accident Claims Fund has built up a

sizable surplus, and that the fees charged were excessive, is premature and that there are no facts presently before the Court which can justify summary judgment or otherwise on Count VI of Plaintiffs' amended complaint and therefore said Count is dismissed without costs and without prejudice.

IT IS HEREBY FURTHER ORDERED that during the pendancy of the within proceedings and until the further order of this Court, that one-half (1/2) of the annual fee paid by each member of this class comprising the Plaintiffs, to-wit: $22.50, plus interest thereon at the rate of six (6%) percent from October 1, 1973 shall be forthwith deposited in a special escrow account or accounts with the State of Michigan or in a commercial bank or banks which shall be separate and distinct from any other account of the State of Michigan maintained or created under the Motor Vehicle Accident Claims Act, as amended, and said funds shall not be comingled with any other funds of the State of Michigan or with any funds of the Motor Vehicle Accident Claims Act.

IT IS FURTHER ORDERED that except as herein provided, no withdrawals whatsoever shall be made from said special escrow account or accounts until the further order of this Court.

IT IS HEREBY FURTHER ORDERED that during the pendency of the within proceedings and until the further Order of this Court, the State of Michigan and the individual Defendants shall:

(a) Only be allowed to withdraw funds from the aforementioned special escrow account and/or accounts to purchase or repurchase United States Treasury bills and/or Certificates of Deposit or such other acceptable investments to this Court.

(b) Duly and accurately record all withdrawals and purchases of such investments as aforesaid and keep said record available as a public record.

IT IS HEREBY FURTHER ORDERED that said special escrow account of accounts and any of the proceeds thereof and all investments in the aforementioned United States Treasury bills and/or Certificates of Deposit or such other investments, shall at all times hereafter be subject to the order of this Court and shall be disposed of as determined by the Court subject to such charges and fees that this Court should then or thereafter determine.

IT IS FURTHER ORDERED that this Court retain jurisdiction of this cause to determine proper notice to be given to all members of the Class constituting the Plaintiffs and to determine fair and reasonable fees and expenses to be paid out of the fund hereinabove set forth to the attorneys representing the class.

/s/ Horace W. Gilmore
Circuit Judge

A TRUE COPY
JAMES R. KILLEEN
CLERK

By /s/ R. Bershaw
Deputy Clerk

APPROVED AS TO FORM ONLY:
/s/ Carl K. Carlsen
Carl K. Carlsen
Assistant Attorney General

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

WILLIE BRAY, ET AL.
Plaintiffs,

vs.

STATE OF MICHIGAN, ET AL.
Defendants.

CIVIL ACTION
NO. 73-248161 CZ and
All other Consolidated
Actions.

OPINION OF THE COURT

(Entered November 25, 1974)

This is a class action. The plaintiffs are a class of approximately 350,000 uninsured motorists who paid the requisite fee of $45, pursuant to the Motor Vehicle Accident Claims Act, MCLA 257.1101, in order to register their uninsured motor vehicles to obtain 1973 Michigan license plates.

Midway through the 1973 registration year, Act 294 of the Public Acts of 1972 (MCLA 500.3101 et seq; 24.13101 et seq) became effective. It required all motorists, other than motorcycle owners, to carry no-fault insurance under Act 294 on and after October 1, 1973.

Plaintiffs seek refund of one-half of the uninsured motorists fee paid, or $22.50, plus interest. They also seek in Count V an order of this Court, directing the State to pay reasonable interest to the Uninsured Motorist Fund as a result of a transfer of $45,000,000 to the State General Fund, and the subsequent repayment of that amount without interest.

In addition, plaintiffs seek repayment from the fund, in addition to the $22.50, of an amount equal to the sum by

which the fees paid pursuant to the Motor Vehicle Accident Claims Act were in excess of those necessary to fund the program, plus interest thereon from date of payment.

Three basic issues are involved. The first is whether the plaintiffs have a right to receive the $22.50, plus interest, representing one-half of the amount paid on or before March 31, 1973.

The second issue is whether the Court can or should order the payment of interest upon the $45 million dollars transferred to the General Fund and subsequently returned to the Uninsured Motorists Fund.

The third issue is whether the Court should order a refund of the amount by which fees paid pursuant to the Motor Vehicle Accident Claims Act were in excess of those necessary to fund the program it created.

I

The first question is whether a refund of $22.50 should be made. Plaintiffs contend that the payment of the $45 fee was an annual license fee to drive an uninsured motor vehicle on the road, and when their privilege of driving was terminated on October 1, 1973, with the enactment of mandatory no-fault automobile insurance, they had a right to recover the unused portion of their license fee. In addition, they claim they are entitled to recover the money on a quasi-contract basis. They further claim that retaining the $22.50 for each plaintiff denies plaintiffs equal protection of the law and deprives them of property without due process of law.

Section 3 (3) of the Motorists Vehicle Accident Claims Act, as amended, MSA 9.2803(d); MCLA 257.1103(3) states:

> "Every person registering an uninsured motor vehicle in this state shall pay annually at the time of registering, in addition to any other fee prescribed by law, a fee of $45.00 . . ."

The $45 fee was intended to be segregated from other fees at the time of registration. This is provided for by MSA 9.2803(1); MCLA 257.1103(1), which states in pertinent part:

> ". . . There shall be a fund to be known as the motor vehicle accident claims fund, into which shall be paid the fees prescribed under this section . . ."

It is plaintiffs' position that the statute granted an annual license to operate an uninsured motor vehicle upon the road for those who paid the required fee, and because it is a license fee, the state has no right to retain that portion of the fee when the license to operate upon the roads was terminated on October 1, 1973, with the enactment of the No-Fault Insurance Act. Defendants, on the other hand, contend that the only purpose of the fee was the raising of revenue in order that the remedies set forth in the act could be accomplished.

The first issue therefore is whether the $45 fee is a license or a tax. The differences between a tax and license fee were considered in two significant cases by the Supreme Court. The first is *Vernor* v. *Secretary of State*, 179 Mich. 157 (1914). The second is *Merrelli* v. *St. Clair Shores*, 355 Mich. 575 (1959). In discussing this matter the Court in *Merrelli* said (p. 583):

> "In short, we have considered two sources of municipal funds, differing in governmental therory, each having inherent limitations resulting therefrom. One involves an exercise of the municipal power of taxation. Its purpose is to raise money. The other is an exercise of the police power of the community. Its purpose is the protection of the public health, safety and welfare. True, certain monies may be obtained in connection therewith, but such moneys are incidental to the accomplishment of the primary purpose of guarding the public. The differences between the two were well expressed in *Vernor* v.

Secretary of State, 179 Mich. 157, 167-170 . . . involving the validity of an automobile license fee:

> 'To be sustained, the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies (Citing cases.)
>
> 'It is true that it has been held that what is a reasonable fee must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case. It will be presumed that the amount of the fee is reasonable . . .
>
> 'In determining whether a fee required for a license is excessive or not, the absence or amount of regulatory provisions and the nature of the subject of regulation should be considered . . .' "

See also *University Custom Homes, Inc.*, v. *Township of Redfood*, 355 Mich. 606 (1955).

A license is a permission to do something which would otherwise not be allowable. See *Shilvers* v. *People*, 11 Mich. 43 (1862); *Youngblood* v. *Sexton*, 32 Mich. 406 (1875).

It appears clear that the $45 fee was an annual license granted to uninsured motorists to operate their vehicles upon the public highway. The Motor Vehicle Accident Claims Fund was not intended as a revenue or tax measure. Its stated purpose was "the establishment, maintenance and administration of a motor vehicle accident claims fund for the payment of damages for injury or death of certain persons arising out of the ownership, maintenance or use of

motor vehicles in the state . . ." (P. A. 165, No. 198) Its purpose was to protect persons injured by uninsured motorists. *Lisee* v. *Secretary of State*, 388 Mich. 32 (1972). The fee paid at the time of registration set up a revolving fund to pay for the fund's administration, to pay the claims of those injured by uninsured motorists, and to reimburse the fund when it was unable to obtain satisfaction from an uninsured motorists or when it gave recovery to someone injured by an unidentified hit-and-run driver.

Under the tests of Vernor and Merrelli, supra, the $45 fee was a license fee. It follows that the license fee must bear a reasonable relation to the expense of administering the fund and paying claims of those injured by an uninsured motorist.

Plaintiffs had notice that the payments made to the Uninsured Motorists Fund would not give them a 12 month's license because the No-Fault Insurance Act Statute was passed in November, 1972, to become effective in October, 1973. It could be argued that becasue of this plaintiffs cannot claim a refund. This argument, however, is not persuasive. The effectiveness of a statute begins upon the date of its stated effectiveness and not upon the date of its passage. Until a law goes into effect it cannot be noticed and it is not binding. See *Price* v. *Hopkins*, 13 Mich. 318 (1865); *Weaver* v. *Harvey*, 32 Mich. App. 424 (1971).

Defendants further argue that the payment of the fee did not confer a benefit on the Motorists Vehicle Accident Claims Fund or unjustly enrich it, because the liability to respond for damages in appropriate instances was subsequently unchanged until the passage of 1974 Public Act 223, effective July 26, 1974. (MSA 9.2805; MCLA 257.1105).

It is clear that the liability of the Motor Vehicle Accident Claims Fund was unchanged during the 1973 registration year for uninsured motorists who drove their cars

contrary to the No-Fault Act, MSA 24.13101; MCLA 500.3101. The fund is liable to pay damages in certain instances where drivers drove on the road in violation of the criminal law. (See MCLA 500.3102(2)). It is true that under certain fact situations the fund will provide the only resource for someone injured in an accident after the effective date of the No-Fault Insurance Act. It is further true there will be some uninsured motorists on the road. In fact, defendant states it has received a total of 540 claims for accident which occurred between October 1, 1973, and July 25, 1974, the effective date of 1974 P. A. 223 (supra).

But this Court cannot base its decision upon the fact that certain drivers will violate the law and therefore place some burden upon the fund. Clearly, the burden is greatly reduced and the Court must proceed upon the assumption that drivers will comply with the law.

Therefore, in view of the fact the fee is a license, not a tax, and in view of the fact that the uninsured motorists received only one-half of the protection under the license they paid for, it must follow that the plaintiffs are entitled to a refund of one-half the fee paid, or $22.50 each, plus interest.

In reaching this decision, the Court does not consider the various constitutional claims of plaintiffs, nor does it consider whether Article IX, Section 9, of the Michigan Constitution was violated. The $45 fee paid by plaintiffs was a license for the privilege of driving an uninsured motor vehicle upon the roads for a period of one year. Plaintiffs received the benefit of their license for only six months. They are therefore entitled to their refund.

II

In May of 1971, 45 million dollars was transferred from the Uninsured Motorists Fund to the State General Fund

pursuant to 1971 P. A. 19, MCLA 257.1103a. That statute provided in paragraph 3:

> "In addition to the annual appropriations provided for in sub-section 2, there shall be appropriated annually to the motor vehicle accident claims fund interest on the balance remaining payable. Such interest shall be at the rate to be determined annually by the Legislature. The first annual determination of interest and payment thereof shall be in the fiscal year beginning July 1, 1973."

On or about June 30, 1973, the State Treasurer, pursuant to an appropriation act, 1973 P. A. 51, repaid the entire $45 million to the uninsured motorists fund without payment of interest. Plaintiffs ask that the Court determine a commercially reasonable rate of interest to be paid on the money loaned from the Uninsured Motorists Fund, and order said amount to be paid from the State General Fund to the Uninsured Motorists Fund.

It appears to the Court that it has no jurisdiction to issue such an order. It is clear from the language of 1971 P.A. 19 that the Legislature retained jurisdiction in determining the amount of interest and set forth the conditions under which such interest would be due. Further, the Legislature exercised its authority and jurisdiction over the fund and ordered the entire amount repaid without interest.

This Court has no jurisdiction to take any action. The money was transferred by the Legislature with interest specified. At a later date, the Legislature, in its wisdom, chose to order full repayment without interest.

This Court may not perform a legislative function, nor may it second-guess the Legislature's discretion in electing to transfer the money without interest. Therefore, the Court does not need to address itself to the issue of whether it has jurisdiction to issue a writ of mandamus. The Court has no

jurisdiction to undo legislative action, and the request for an order directing the payment of a commercially accepted rate of interest is denied.

III

Plaintiffs claim in Count VI that the Motor Vehicle Accident Claims Fund has built up a sizable surplus during its years of operation, because the fees charged since the inception were far in excess of those necessary to fund the program. It contends the fees were so excessive that they were not reasonably related to any valid legislative end, and the State has therefore denied plaintiffs' due process of law and violated the rule against using the police power to raise revenue. It seeks an order directing the fund to pay to plaintiffs, in addition to the $22.50 discussed in Section I of this opinion, an amount to be determined by which the fees paid pursuant to the Act were in excess of those necessary to further the program created, plus interest thereon from date of payment.

The Court does not have a sufficient record to justify such action and will deny this relief. 540 claims have been filed relating to accidents which occurred between October 1, 1973, and July 26, 1974. This number does not include claims filed after October 1, 1973, for accidents occurring prior to that date, and, according to the brief of defendant, new claims are being filed with the Motor Vehicle Accident Claims Fund at the rate of approximately 70 per month.

There is a three-year Statute of Limitations under Section 18 of the Motor Vehicle Accident Claims Fund (MSA 9.2818; MCLA 257.1118), and even though there is a requirement that notices be given the Secretary of State within six months of the date the cause of action accrues, the Supreme Court in *Carver* v. *McKernan*, 390 Mich. 96, 110 (1973) said:

> "While we decline to declare that the notice requirement of Section 18 is constitutionally defective, we

hold that only upon a showing of prejudice by failure to give such notice, may the claim against the fund be dismissed."

The Supreme Court has therefore held that the three-year Statute of Limitations is effective unless the fund can show prejudice by the failure to give notice within six months. Further, in *Lisee* v. *Secretary of State*, 388 Mich. 32 (1972), the Court held that where the Secretary of State had actual notice of the accident claimed, the notice of claim need not be filed before the three-year statute. It is therefore possible that hundreds or thousands of claims covering accidents that occurred prior to October 1, 1973, may be filed in the future. Such actions could be filed through September 30, 1976.

There is no way this Court can say that there are excessive funds on hand in the Motor Vehicle Accident Claims Fund. Therefore, for these reasons, the relief sought in Count VI of plaintiffs' complaint will be denied.

A judgment embodying the findings of this Opinion may be presented.

/s/ Horace W. Gilmore
HORACE W. GILMORE
Circuit Judge

Detroit, Michigan

Michigan Statutes
(Motor Vehicle Accident Claims Act)

In 1973, the Motor Vehicle Accident Claims Act provided:*

AN ACT providing for the establishment, maintenance and administration of a motor vehicle accident claims fund for the payment of damages for injury to or death of certain persons or property damage arising out of the ownership, maintenance or use of motor vehicles in the state in certain cases.

The People of the State of Michigan enact:

Mich. Comp. Laws § 257.1101 Motor vehicle accident claims act; short title.

Sec. 1. This act shall be known and may be cited as the "motor vehicle accident claims act".

Mich. Comp. Laws § 257.1102 Motor vehicle accident claims act; definitions.

Sec. 2. As used in this act:

(a) "Secretary" means the secretary of state acting as director of the fund.

(b) "Treasurer" means the state treasurer acting as the custodian of the fund.

(c) "Fund" means the motor vehicle accident claims fund.

(d) "Uninsured motor vehicle" means a motor vehicle as to which there is not in force a liability policy meeting the requirements of the motor vehicle responsibility law of this state, established pursuant to the provisions of chapter 5 of Act No. 300 of the Public Acts of 1949, as amended, being sections 257.501 to 257.532 of the Compiled Laws of

* The Motor Vehicle Accident Claims Act was enacted in 1965 and amended in 1967 and 1971. See, 1965 Public Acts, No. 198, 1967 Public Acts, No. 274, 1971 Public Acts, Nos. 19 and 63.

1948, and which is not owned by a holder of self-insurance under the law.

(c) "Person" includes natural persons, firms, copartnerships, associations and corporations, except the state or any agency or political subdivision thereof. The word "person" shall not include any municipal corporation or any corporation owned or operated by the state or any political subdivision thereof.

Mich. Comp. Laws § 257.1103 Motor vehicle accident claims fund; establishment; annual statement and audit; investment; reversion.

Sec. 3. (1) There shall be a fund to be known as the motor vehicle accident claims fund into which shall be paid the fees prescribed under this section. A detailed financial statement of the condition of the fund shall be published by the secretary of state annually. This fund shall be subject to a financial audit by the auditor general. The treasurer shall deposit or invest any unappropriated portion of the fund, in the same manner and subject to all provisions of law with respect to the deposit or investment of state funds by the state treasurer, and all interest earned by such portions of the fund as may be deposited or invested by the treasurer shall be collected by him and placed to the credit of the fund. All unexpended moneys appropriated from the fund shall revert to the fund at the end of each fiscal year.

Insurance commissioner; powers.

(2) The commissioner of insurance shall have the power of visitation and examination of the affairs of the fund as though the fund were an insurer and shall report to the governor and the legislature on its financial position, actuarial soundness, and general condition. A copy of the report shall be filed with the auditor general for his use in auditing the fund. The fund shall also file an annual statement relating to business and affairs on such form as the commissioner shall prescribe.

Michigan Statutes
(Motor Vehicle Accident Claims Act)

Uninsured vehicle fee; transfer of registration.

(3) Every person registering an uninsured motor vehicle in this state shall pay annually at the time of registering, in addition to any other fee prescribed by law, a fee of $45.00. Such fee shall not be paid in connection with a transfer of registration plates.

Insured vehicle fee; transfer of registration.

(4) Every person registering any other motor vehicle in this state shall pay annually at the time of registering, in addition to any other fee prescribed by law, a fee of $1.00. Such fee shall not be paid in connection with a transfer of registration plates.

Insured vehicle fee, noncollection; reinstatement.

(5) As of the close of the fiscal year ending June 30, 1970, and at the end of each fiscal year thereafter, the insurance bureau of the department of commerce shall examine the records of the fund in accordance with insurance accounting principles and file its report with the secretary on or before the succeeding April 1. The balance remaining payable to the fund from the general fund under the provisions of section 3a shall be counted as an asset of the fund. If the report by the insurance bureau shows that the fund has a free surplus equal to or greater than 40% of the combined gross claims and claim expense reserves, the secretary shall not assess and collect the $1.00 fee required to be paid on insured vehicles for the registration year following the filing of the report. If any annual report of the insurance bureau shows that the fund has a free surplus less than 40% of the combined gross claims and claim expenses reserves as of the end of the fiscal year, the secretary shall reinstate the $1.00 fee for the registration year following the filing of the report and for each year thereafter until a free surplus in the fund equal to more than 40% of the combined gross claims and claim expense reserves is shown by an annual insurance bureau report.

Michigan Statutes
(Motor Vehicle Accident Claims Act)

False evidence of insurance; penalties.

(6) Any person who furnishes false evidence of insurance upon the issuance or transfer of registration under this section is guilty of a misdemeanor. In addition his operator's or chauffeur's license or motor vehicle registration, or both, may be suspended by the secretary for a period of not more than 1 year.

Lapse or cancellation of insurance; fee; failure, penalty.

(7) Upon the cancellation or lapse of a motor vehicle liability insurance policy, or if the person's insurance shall terminate by reason of the company with whom he is insured becoming insolvent or in bankruptcy or receivership, the owner of such automobile shall pay the uninsured motor vehicle fee established in subsection (3) or obtain insurance before operating or permitting the operation of the vehicle upon the highways of this state. Any owner who operates or permits the operation of an uninsured motor vehicle upon the highways of this state without having paid the uninsured motor vehicle fee is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year or by a fine of not more than $1,000.00 or both and shall pay the uninsured motor vehicle fee upon demand of the secretary. The secretary may cancel, revoke or suspend the owner's registration or registrations upon failure of the owner to pay the fee upon demand.

Illegal use of information, penalty.

(8) It shall be unlawful for any person to use any records or information produced as a result of the administration of any provisions of this act for the purpose of soliciting the sale or purchase of motor vehicle liability insurance. A conviction of a violation of this subsection shall be punished by imprisonment for not more than 1 year or by a fine of not more than $1,000.00, or both.

Michigan Statutes
(Motor Vehicle Accident Claims Act)

Mich. Comp. Laws § 257.1103a Transfer to general fund; repayment; interest.

Sec. 3a. (1) Upon the effective date of this section, the state treasurer is authorized to transfer the sum of $45,000,000.00 from the motor vehicle accident fund to the state general fund. The state accounting division shall treat the transfer as revenue from other funds.

(2) To reimburse the motor vehicle accident claims fund for the cash transferred pursuant to subsection (1), there is appropriated from the general fund for the fiscal year beginning July 1, 1973 and for each of the fiscal years beginning July 1, 1974, 1975, 1976 and 1977, the sum of $9,000,000.00. There is appropriated from the general fund each fiscal year from the effective date of this act through the fiscal year beginning July 1, 1976, an amount sufficient to pay any due and payable claims which exceed available revenue of the motor vehicle accident claims fund, which amount shall be deducted from the subsequent $9,000,000.00 annual appropriation contained in this section to the motor vehicle accident claims fund.

(3) In addition to the annual appropriations provided for in subsection (2) there shall be appropriated annually to the motor vehicle accident claims fund interest on the balance remaining payable. Such interest shall be at a rate to be determined annually by the legislature. The first annual determination of interest and payment thereof shall be in the fiscal year beginning July 1, 1973.

Mich. Comp. Laws § 257.1104 Evidence of insurance or payment of fee, exhibition; violation; foreign state operators.

Sec. 4. (1) The owner or operator of a motor vehicle who operates or permits its operation upon the highways of this state shall produce, in accordance with the provisions of subsection (3) of this section, upon the request of any peace officer, evidence that the vehicle is an insured motor vehicle, or that the uninsured motor vehicle fee has been paid.

(2) The secretary shall issue to the owner of an uninsured motor vehicle a document that may be produced as evidence that the uninsured motor vehicle fee has been paid.

(3) Every owner or operator of a motor vehicle who fails to produce evidence when requested to do so or within 72 hours thereafter is guilty of a misdemeanor. A certificate of insurance issued by an insurance company stating that there is in force a liability policy meeting the requirements of the motor vehicle responsibility law of this state, shall be accepted as prima facie evidence of insurance being in force until the expiration date shown on the certificate.

(4) Every owner or operator of a motor vehicle who knowingly produces false evidence under this section is guilty of a misdemeanor. In addition, his operator's or chauffeur's license or motor vehicle registration, or both, may be suspended by the secretary for a period of not more than 1 year.

(5) Where the owner or operator of a motor vehicle is convicted under this section and he has not paid the uninsured motor vehicle fee for the current year in respect to the motor vehicle, the license plates and vehicle registration shall be forwarded by the court to the department of state for cancellation unless he produces evidence that there was in force a liability policy meeting the minimum requirements of the motor vehicle responsibility laws of this state with respect to the operation of the motor vehicle at the time the offense was committed.

(6) The provisions of this section do not apply to the owner or operator of a motor vehicle that is registered in a country, state or province other than this state.

Michigan Statutes
(Motor Vehicle Accident Claims Act)

Mich. Comp. Laws § 257.1105 Service of process; secretary of state; failure to serve, effect; intervention.

Sec. 5. The secretary is deemed to be an agent of the owner or operator of every uninsured motor vehicle for service of process in an action in this state arising out of the use or operation in this state of the uninsured motor vehicle. Where such an action is commenced, summons and complaint shall be served on the secretary by certified or registered mail or by leaving a copy thereof with or at the office of the secretary who shall forward a copy of the summons and complaint forthwith by certified mail to the defendant at his last address as recorded with the secretary. In any action to recover damages arising out of the use or operation of an uninsured motor vehicle, failure to serve summons and complaint upon the secretary shall constitute a bar to recovery from the fund. In all actions where summons and complaint have been served upon the secretary, the secretary shall have the right to intervene in the action as a party defendant.

Mich. Comp. Laws § 257.1106 Death or injury by uninsured motorist; application for payment from fund.

Sec. 6. (1) Where the death of or personal injury or property damage to any person or property is occasioned in this state by an uninsured motor vehicle, any person who would have a cause of action against the owner or driver of the uninsured motor vehicle in respect to the death or personal injury, or property damage except a person entitled to make an application under section 7, may make application, in a form prescribed by the secretary, for payment out of the fund subject to the limitations provided in this act for all damages in respect to the death or personal injury and for damages in excess of $200.00 in respect to property damage.

Uninsured motorist; notice of application.

(2) Upon receipt of application under this section, the secretary shall forward, by certified mail, notice of the application to the owner and driver of the uninsured motor vehicle against whom liability for damages is alleged, to their last addresses as recorded with the secretary.

Secretary of state; payment from fund, conditions.

(3) In respect to the application, the secretary may make payment out of the fund, subject to section 23, of an amount that he deems proper if:

(a) The applicant executes a written release of all claims arising out of the accident to be paid from the fund; and

(b) The owner and driver of the uninsured motor vehicle, against whom liability is alleged, execute written consent to the payment of the sum for damages out of the fund and also execute an agreement in writing to repay the fund the amount to be paid from the fund; or

(c) The person to whom a notice is sent in accordance with subsection (2) does not reply in writing within 20 days of the date upon which the notice was sent, disputing his liability.

Same; subrogation.

(4) Where an amount is paid out of the fund under this section, the secretary is subrogated to the rights of the person to whom the amount is paid and may maintain an action in his own name or in the name of the person against the person responsible for the use or operation of the uninsured motor vehicle.

Same; suspension of uninsured motorist; reinstatement; conditions.

(5) Where payment is made under this section, the operator's or chauffeur's license and owner's registration or

registrations of the persons to whom the notice was forwarded under this section shall be forthwith suspended by the secretary and shall not be reinstated until such person or persons have:

(a) Repaid in full to the fund the amount paid out; or

(b) Commenced installment repayments in accordance with an agreement made with the secretary, and filed proof of financial responsibility until the amount paid out in settlement of the claim by the motor vehicle accident claims fund has been repaid in full.

Same; suspension on defaults in payments.

(6) Where a person who has commenced repayment of an amount paid out of the fund is in default in any payment for a period of 10 days, or fails to maintain proof of financial responsibility as required by this act, the secretary shall forthwith suspend the operator's or chauffeur's license and vehicle registration or registrations of the person.

Mich. Comp. Laws § 257.1107 Judgment for damages caused by uninsured motorist; application for payment.

Sec. 7. (1) Subject to section 8, where a person recovers in any court in this state a judgment for damages on account of injury to or the death of any person or property damage occasioned in this state by an uninsured motor vehicle owned or operated by the judgment debtor within this state, upon the determination of all proceedings, including appeals, he may make application, in the form prescribed by the secretary for and the secretary shall pay the amount of the judgment or of the unsatisfied portion thereof in excess of $50.00 out of the fund.

Same; notice to applicant of objection to payment.

(2) Where an application is made under this section, the secretary, at any time within 30 days of the receipt of the

application, may give written notice to the applicant of any objection to payment of such judgment or any part of it. Where the secretary gives the notice the applicant may apply to the court entering judgment for a finding or determination in respect of any matter in connection with the application for payment out of the fund.

Same; action to be against all defendants.

(3) The secretary shall not pay out of the fund any amount in respect of a judgment unless the judgment was given in an action brought against all persons against whom the applicant might reasonably be considered as having a cause of action in respect of the damages in question and prosecuted against every such person to judgment or dismissal.

Mich. Comp. Laws § 257.1108 Default judgments; failure to notify secretaty of state, appearance; pleadings, reopening; settlements.

Sec. 8. (1) Section 7 does not apply in the case of a judgment entered in an action in which the defendant did not enter an appearance, did not file an answer, or did not appear in person or by counsel at the trial, or judgment was entered upon the consent or with the agreement of the defendant, unless the secretary has been given notice of the failure, consent or agreement and has been afforded an opportunity to take such action as he may deem advisable under subsection (2).

(2) Where the secretary receives notice under this section, he may enter an appearance within 30 days, file an answer, make payment into court, appear by counsel at the trial or take such other action as he may deem appropriate on behalf and in the name of the defendant, and thereupon, on behalf and in the name of the defendant, may conduct his defense, and may consent to judgment in such amount as he may deem proper in all the circumstances, and all acts done in accordance therewith shall be deemed to be the acts of the defendants.

(3) Where pleadings have been closed, the secretary, upon giving notice to the court and to all proper parties to the action that he intends to defend the action on behalf and in the name of the defendant, may reopen the pleadings upon praecipe.

(4) In any action to recover damages arising out of the use or operation of an uninsured motor vehicle any settlement made between the plaintiff and defendant shall not be binding upon the secretary or the fund unless the secretary consents thereto.

Mich. Comp. Laws § 257.1109 Assignment of judgment; settlement of claim.

Sec. 9. The secretary shall not pay out of the fund any sum under section 7 until the judgment creditor assigns the judgment to him. The secretary may make settlement of a claim which is brought pursuant to section 13 and pay out of the fund any sum necessary to satisfy the settlement.

Mich. Comp. Laws § 257.1110 Suspension of licenses; reinstatement, conditions.

Sec. 10. Where the secretary pays out of the fund any amount in satisfaction of a judgment, the operator's or chauffeur's license and vehicle registration or registrations of the judgment debtor on whose behalf the payment is made shall be forthwith suspended by the secretary and shall remain suspended until he has:

(a) Repaid in full to the fund the amount paid out; or

(b) Commenced installment repayments in accordance with an agreement entered into with the secretary, and filed proof of his financial responsibility until the amount paid out to satisfy the judgment by the motor vehicle accident claims fund has been repaid in full.

Michigan Statutes
(Motor Vehicle Accident Claims Act)

Mich. Comp. Laws § 257.1111 Default in repayment; suspension of licenses.

Sec. 11. When a person is in default of any installment payment for a period of 10 days, or fails to maintain proof of financial responsibility as required by this act, the secretary shall forthwith suspend the operator's or chauffeur's license and vehicle registration of the person.

Mich. Comp. Laws § 257.1112 Death or injury by unidentified vehicle or driver; action against the secretary of state.

Sec. 12. Where the death of or personal injury or property damage to any person or property is occasioned in this state by a motor vehicle but the identity of the motor vehicle and of the driver and owner thereof cannot be estabished, any person who would have a cause of action against the owner or driver in respect to the death or personal injury or property damage may bring an action against the secretary, either alone or as a codefendant with others alleged to be responsible for the death or personal injury or property damage.

Mich. Comp. Laws § 257.1113 Same; adding secretary of state as defendant.

Sec. 13. Where an action has been commenced in respect of the death of or injury or property damage to any person or property occasioned in this state by a motor vehicle and it is alleged that the death or injury or property damage was caused or contributed to by another motor vehicle, the identity of which and the owner and the driver thereof cannot be established, the secretary may be added as a defendant on the application of any party and shall be added as a defendant on his own application.

Mich. Comp. Laws § 257.1115 Death or injury by stolen vehicle; action against the secretary of state.

Sec. 15. When the death of or personal injury or property damage to any person or property is occasioned in this state by a motor vehicle at a time when the motor vehicle

was without the owner's consent in the possession of some person other than the owner and the identity of the person in possession of the motor vehicle cannot be established, any person who would have a cause of action against the person in possession of the motor vehicle in respect of the death or injury or property damage may bring an action against the secretary.

Mich. Comp. Laws § 257.1116 Same; general denial by the secretary of state.

Sec. 16. In an action against the secretary, he may deny generally the allegations in respect to the unidentified motor vehicle and unidentified owner and driver thereof and shall not be required to set forth the facts upon which he relies.

Mich. Comp. Laws § 257.1117 Same; judgment against the secretary of state, prerequisites.

Sec. 17. In an action against the secretary, a judgment against him shall not be granted unless the court in which the action is brought is satisfied that all reasonable efforts have been made by the parties, other than the secretary, to ascertain the identity of the motor vehicle and of the owner and driver thereof, and that:

(a) In the case of actions under section 12, the identity of the motor vehicle and of the owner and driver thereof cannot be established; or

(b) In the case of actions under section 15, the identity of the driver of the motor vehicle that caused the death or injury or property damage cannot be established.

Mich. Comp. Laws § 257.1118 Recovery against fund; limitation of action; notice of claim, time.

Sec. 18. In all actions in which recovery is to be sought against the fund, said action must be commenced within 3 years from the time the cause of action accrues. Provided that recovery from the fund shall not be allowed in any

event unless notice of intent to claim against the fund is served upon the secretary, on a form prescribed by him, within 1 year of the date that the cause of action shall accrue.

Mich. Comp. Laws § 257.1119 Judgment against the secretary of state, payment.

Sec. 19. Where judgment is obtained against the secretary upon the determination of all proceedings, including appeals, the secretary, subject to section 23, shall pay out of the fund to the plaintiff in the action the amount of the judgment.

Mich. Comp. Laws § 257.1120 Same; application for order identifying the owner or driver of a motor vehicle; order, effect.

Sec. 20. Where judgment has been obtained against the secretary, he may apply at any time thereafter to the court where judgment has been obtained for an order declaring that any person was, at the time of the accident, the owner or driver of the motor vehicle that occasioned the death or injury or property damage in respect of which the judgment was obtained. Upon the making of an order declaring that any person was the owner or driver of a motor vehicle:

(a) The person, for the purpose of this act, shall be deemed to be the defendant in the action in which judgment was given against the secretary, and the judgment against the secretary shall be deemed to be a judgment against the person; and

(b) The secretary shall be deemed to have a judgment against the person for the amount of all moneys paid out of the fund in respect of the judgment and accordingly has all the rights of a judgment creditor, including the right to recover any moneys that would have been payable in respect of the death or injury or property damage under any policy of insurance that was in force at the time of the accident.

Mich. Comp. Laws § 257.1121 Same; secretary not personally liable to satisfy judgment.

Sec. 21. In an action brought against the secretary, he is not personally liable to satisfy a judgment obtained in the action.

Mich. Comp. Laws § 257.1122 Payment from fund; prohibited when damages paid or payable from insurance.

Sec. 22. No payment shall be made out of the fund in respect to a claim or judgment for damages or in respect to a judgment against the secretary of an amount paid or payable by an insurer by reason of the existence of a policy of liability insurance and no amount sought to be paid out of the fund shall be sought in lieu of making a claim or receiving a payment that is payable by reason of the existence of a policy of liability insurance, and no amount so sought shall be sought for payment to an insurer to reimburse or otherwise indemnify the insurer in respect of any amount paid or payable by the insurer by reason of the existence of a policy of liability insurance.

Mich. Comp. Laws § 257.1123 Same; limitation on damages payable from fund; interest, costs.

Sec. 23. (1) In respect to applications under this act for payment of damages arising out of motor vehicle accidents occurring in this state on or after January 1, 1966, the secretary shall not pay out of the fund, (a) more than $10,000.00, exclusive of costs, on account of injury to or the death of one person, and, subject to such limit for any one person so injured or killed, not, more than $20,000.00, exclusive of costs, on account of injury to or the death of 2 or more persons in any one accident; and (b) more than $5,000.00, exclusive of costs, for loss of or damage to property resulting from any one accident.

(2) Where any amount is recovered from any other source in partial discharge of the judgment debt, the maximum amount prescribed in this section shall be reduced by the amount so paid, and any amount paid out of the fund in excess of the amount authorized by this section may be recovered by action brought by the secretary.

(3) The secretary shall not pay out of the fund any amount for interest or costs.

Mich. Comp. Laws § 257.1124 Residence, date of determination.

Sec. 24. In this act, residence shall be determined as of the date of the motor vehicle accident as a result of which the damages are claimed.

Mich. Comp. Laws § 257.1125 Nonresident; payment from fund prohibited, exception.

Sec. 25. The secretary shall not pay out of the fund any amount in favor of a person who resides outside of this state unless the person resides in a jurisdiction in which recourse of a substantially similar character to that provided by this act is afforded to residents of this state, but no payment shall include an amount that would not be payable by the law of the jurisdiction in which the person resides.

Mich. Comp. Laws § 257.1126 Secretary of state, personnel; attorney general, duties; contracts with private attorneys; professional fees, payment from fund.

Sec. 26. The secretary may employ such office, clerical and professional help and claims investigators as is necessary to carry out the provisions of this act. The attorney general shall assign members of his staff to assist the secretary and may contract with such private attorneys as are necessary to defend actions against the fund. All wages and professional fees for services hereunder shall be charged to and payable from the fund.

Mich. Comp. Laws § 257.1127 Costs, payment from fund.

Sec. 27. All costs incurred by the secretary in the administration of this act shall be charged to and paid from the fund.

Mich. Comp. Laws § 257.1128 Claims or actions against fund, limitation.

Sec. 28. All claims or actions under which any person seeks to recover from the fund shall be filed or commenced within 3 years from the date of accident.

Mich. Comp. Laws § 257.1129 Workmen's compensation; coverage prohibits recovery from the fund.

Sec. 29. Any person covered with respect to such injury or death by workmen's compensation law or the personal representative of such person shall not be permitted to recover from the fund.

Mich. Comp. Laws § 257.1130 Practice and procedure in courts where application made.

Sec. 30. The practice and procedure of the supreme court or the court in which the application or action is brought, including the right of appeal and the practice and procedure relating to appeals, apply to an application or action brought under this act.

Mich. Comp. Laws § 257.226. Motor vehicle registration; expiration. (1967 Mich. Public Acts, Extra Session, No. 3)

Sec. 226. (a) Every vehicle registration under this act and every registration certificate and registration plate issued hereunder except as provided in section 246 and except for commercial vehicles and trailers, shall expire on March 31 of each year. On or after November 15 preceding the year designated on the plates, the secretary of state shall issue the plates upon proper application and payment of the license fee. For commercial vehicles and trailers, on or after October 1 preceding the year designated on the plates, the secretary of state shall issue the plates upon proper application and payment of the license fee. Every annual commercial and trailer registration certificate and registration plate issued hereunder shall expire on the last day of February of each year.

Michigan Statutes (No-Fault Act)

Mich. Comp. Laws § 500.3101. Security for payment of benefits under personal and property protection and residual liability insurance, necessity, form, approval; definitions. (1972 Mich. Public Acts, No. 294)

Sec. 3101. (1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall be in effect continuously during the period of registration of the motor vehicle.

Mich. Comp. Laws § 500.3102. Security for payment of benefits; criminal sanctions; reports. (1972 Mich. Public Acts, No. 294)

Sec. 3102. (1) A nonresident owner or registrant of a motor vehicle not registered in this state shall not operate or permit the vehicle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits.

(2) An owner or registrant of a motor vehicle with respect to which security is required who operates the motor vehicle or permits it to be operated upon a public highway in this state without having in full force and effect security complying with this section or section 3101 is guilty of a misdemeanor. Any other person who operates a motor vehicle upon a public highway in this state with the knowledge that the owner or registrant does not have security in full force and effect is guilty of a misdemeanor. A person convicted of a misdemeanor under this section shall be fined not less than $100.00 nor more than $500.00, imprisoned for not more than 1 year, or both.

MICHIGAN STATUTES
(Repayment of $45 Million Loan)

1973 Mich. Pub. Acts. No. 59, §2:

AN ACT to make appropriations to supplement former appropriations for certain state agencies and special purposes for the fiscal year ending June 30, 1973; and to declare the intent of the act.

The People of the State of Michigan enact:

* * *

Appropriations; supplemental.

Sec. 2. There is appropriated from the general fund of the state to supplement former appropriations for certain state agencies and special purposes for the fiscal year ending June 30, 1973, the sum of $73,988,772.23 for the purposes and in the amounts as follows:

* * *

		For Fiscal Year Ending June 30, 1973
GRANTS AND TRANSFERS		
Workmen's compensation insurance premium	$ 1,070,820.00	
Grant to agricultural college fund Morrill act	59,379.00	
Grant to veterans' trust fund ..	18,000,000.00	
Grant to motor vehicle accident claims fund	45,000,000.00	
Grant to water pollution control bond and interest redemption fund	1,127,288.20	
Grant to public recreation bond redemption fund	6,472.15	
TOTAL GRANTS AND TRANSFERS		$65,263,959.35

* * *

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

LEON S. COHEN
Deputy Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL
LANSING
48910

December 8, 1970

Representative William R. Copeland
Chairman, Committee on Appropriations
House of Representatives
Lansing, Michigan

Dear Representative Copeland:

You have forwarded to me a copy of certain recommendations of the governor to the appropriations committees. Among these is a recommendation to transfer $10 million from the uninsured motor vehicle fund to the general fund. The governor's recommendation specifically notes that such a transfer can be made "without prejudicing either present or future liabilities." As a result of this recommendation you have requested my opinion as to whether the legislature can make such a transfer.

The motor vehicle accident claims fund was created pursuant to the provisions of the motor vehicle accident claims act, Act 198, PA 1965 as amended; MCLA § 257.1101 et seq; MSA 1968 Rev Vol § 9.2801 et seq. This act is entitled:

> "AN ACT providing for the establishment, maintenance and administration of a motor vehicle accident claims fund for the payment of damages for injury to or death of

certain persons or property damage arising out of the ownership, maintenance or use of motor vehicles in the state in certain cases."

Section 3 of the act creates the motor vehicle accident claims fund.[1] Section 2 designates the secretary of state as director of the fund and the state treasurer as the custodian of the fund. The fund's revenue comes from fees paid for registering motor vehicles and interest accruing to the fund as set forth in Section 3. Section 3 also directs the independent management of the fund by the state treasurer and grants to the commissioner of insurance the power of visitation and examination as though the fund were an insurer. Sections 19 and 22 provide for the payment from the fund of certain claims or judgments on behalf of victims of uninsured or unidentified motorists. Section and 27 provide that costs of administering the fund and certain attorney's fees be paid out of the fund. Section 28 provides for a 3 year statute of limitations for claims against the fund.

The first potential impediment to an act of the legislature to transfer uninsured motor vehicle funds to the general fund is the provision of Article IX, Section 9 of the Michigan Constitution of 1963 which states:

"All specific taxes, *except* general sales and use taxes and *regulatory fees*, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and on registered motor vehicles shall, after the payment of necessary collection expenses, be used exclusively for highway purposes as defined by law."
(emphasis added)

It will be noted that the delegates to the Constitutional Convention in their Address to the People said that this provision "retains earmarking of gas and weight taxes for highway purposes" and that the only significant change in this provision from the former Article X, Section 22 of the Michigan

[1] This section was amended by Act 389, PA 1965, Act 274, PA 1967; Act 223, PA 1968.

Constitution of 1908 was through the addition of the words "as defined by law" following "highway purposes" at the conclusion of the section. Official Record Constitutional Convention 1961, Vol. II, page 3400. This statement of intent, as well as a study of the debates on this provision, indicates that the framers intended that only gas and weight taxes would be earmarked for highway purposes as defined by law. Official Record Constitutional Convention 1961, Vol. I, pages 780 through 785.

If, then, the exaction of a charge of $1 and $35 at the time of registration of the motor vehicle is a regulatory fee rather than a tax, there would be no impediment resulting from Article IX, Section 9 that would prohibit such a transfer. In my opinion this charge is a regulatory fee collected from motorists at the time of registration of their motor vehicle for the purpose of establishing a fund rather than a tax.

In *Blake* v. *Metropolitan Chain Stores* (1929), 247 Mich. 73, 76, the Michigan Supreme Court pointed out that the word "taxes" presents to the mind exactions to defray the ordinary expenses of government and the promotion of general welfare. Thus, for example, in *Ash* v. *The People* (1863), 11 Mich. 347, the court held that a fee paid for indemnity to a city in relation to the licensing of a stall outside of a public market is not a tax. And, in *Manistee River Improvement Co.* v. *Sands* (1884), 53 Mich. 593, the court held that a toll for passage over land or waterway is not a tax. Also, in *Holmes* v. *Cheney* (Ark. 1962), 352 SW2d 943, the court specifically determined that a charge of $1 for a motor vehicle certificate of title was a "fee" and not a "tax."

Nevertheless there is a serious question as to whether the legislature may divert funds from the special fund which it has created by enactment of Act 198, PA 1965, supra, since motorists at the time of the registration of their vehicles have contributed the money which built up the fund with the expectation that this fund would be available for payment of costs incurred as a result of injuries and damages resulting from an

accident caused by an uninsured motorist. In this connection it may be noted that privately operated automobile insurance companies also offer insurance to cover losses suffered as a result of injuries and damages caused by the fault of an uninsured motorist and these insurance companies charge a premium for such coverage. Since the state has undertaken to provide such coverage, it is not unlikely that many Michigan motorists have failed to obtain such coverage from private insurance companies with the expectation that, if they are injured or suffer property damages as a result of the fault of an uninsured motorist, they could look to the state motor vehicle accident claims fund for reimbursement.

While there is a paucity of Michigan appellate decisions on the extent to which a legislature may transfer special funds created by it, there are cases in other jurisdictions which have recognized and discussed this issue. In *Daugherty, Commissioner of Corporations*, v. *Riley, State Controller* (Cal. 1934), 34 P2d 1005, the California court held that a statute withdrawing funds from a special corporation commission fund which was established to protect the public against fraudulent and unlawful stock and investment schemes is in the nature of a trust fund raised for a particular purpose and could not be diverted permanently from its special purpose. In so holding, the court pointed out as follows:

> " * * * When collected, this revenue is permanently set apart under the continuing appropriation under section 28 of the Corporate Securities Act for the use of the department. In this respect the revenues are in the nature of a trust fund raised for a particular purpose in the exercise by the state of its police power. They are not state revenues in the sense that they may be used for any state purpose as long as the department is in need of them, and the justification for their collection is to make the department self-supporting. * * *."
> (p. 1010)

In *State of Ohio, on the relation of Charles P. Masterson* v. *Ohio State Racing Commission* (Ohio, 1954), 124 NE2d 786, the Ohio Court of Appeals also ruled that a special fund created from the issuance of permits to conduct pari-mutuel wagering was a special fund and not amenable to a taxpayer's suit prohibiting improper payments therefrom although Ohio law does permit a taxpayer to maintain an action which contemplates expenditure of public moneys.

On the other hand, in *Department of Public Welfare* v *Haas* (Ill, 1958), 154 NE2d 265, the court supported the proposition that a transfer from a special fund to the general fund could be made. In this case the Illinois legislature by statute established a special fund of amounts received from the collection of maintenance charges for persons kept at public institutions which fund was to be expended for the training of psychiatric personnel and research in mental illness. The fund was tapped for construction purposes and the court upheld the action of the legislature. In so doing the court stated:

> "* * * The fact that the legislature may provide that amounts, when collected, shall be placed in a certain fund does not ordinarily preclude a later General Assembly from ordering it paid into another fund or from abolishing the fund altogether. People ex rel. City of Chicago v. Barrett, 373 Ill. 393, 26 N. E. 2d 478. For example, it is lawful to divert motor fuel tax funds for emergency relief purposes. Michaels v. Barrett, 355 Ill. 175, 188 N. E. 921. While the constitution permits the diversion of funds for public purposes, the legislature in the instant case has not diverted the fund from its generic purpose. Its action was within its constitutional authority." (p. 272)

Two other appellate courts from other jurisdictions have dealt with this issue. In *Gulf Ins. Co.* v. *James* (Texas 1945), 185 SW2d 966, the legislature provided for transfer of portions of certain funds that had been collected for special purposes to

the general revenue fund and the court ruled that the legislature had the right to make such a transfer. Similarly, in *Rein* v. *Johnson et al* (Neb. 1947), 30 NW2d 548, the Nebraska legislature had established a state assistance fund from any moneys available from motor fuels taxes, alcoholic liquor taxes, head taxes and such other taxes as might be provided by law. Subsequently an unexpended balance of this fund was transferred to the general fund and an action was brought by a taxpayer against the treasurer and auditor of public accounts of Nebraska to enjoin them from paying out of the state assistance fund any funds for any other purpose than for assistance. In ruling that such expenditures could be made the Nebraska court stated:

> "Plaintiff argued that the State Assistance Fund was a special fund created for a particular purpose and could not be legislatively diverted to other purposes. It is true that public revenue derived from taxation and lawfully allocated to a special fund such as the State Assistance Fund, or specifically appropriated thereto for its purposes, *could not administratively or by legislative resolution, as distinguished from legislative law enacted by bill, be diverted or taken therefrom for other purposes*. Nevertheless, any such allocation or specific appropriation, or any unexpended balance of such an appropriation remaining therein at the expiration of the first fiscal quarter after adjournment of the next regular session, would be under the plenary control of the Legislature and subject to its constitutionally enacted laws. * * *."
> (Emphasis added)
> (p. 556)

The basic principle upon which the court relied was that quoted from 59 C.J. "States," § 382, p. 238. This quote read:

> "The legislative power is supreme in matters relating to appropriations as to which no constitutional restrictions exist. Constitutional provisions requiring the existence of appropriations made by law secure to the Legislature this

exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government, and are conservative, not restrictive or prohibitory of the legislative power over the public revenue."

It is also generally recognized that where a surplus in a special fund remains after the accomplishment of the purpose for which an appropriation is made, it may be diverted for other purposes. 42 Am Jur "Public Funds" § 80, p. 776.

And it would be my opinion that it is the right of the legislative body to temporarily loan or transfer money from one fund to another unless prohibited by a specific constitutional provision or a contractual obligation that has been incurred. See *Gates* v *Sweitzer* (Ill. 1932), 179 NE837.

It will also be noted that a former attorney general now serving on the supreme court had advised[2] that the transfer of bonds from the veterans' trust fund, which was initially established by transfer from the general fund, to the general fund was legally permissible on the ground that the assets of the veterans' trust fund remained public money although deposited in a special fund for a stated purpose. See *State ex rel. City of Charleston* v. *Sims*, 132 W. Va. 826.

As a result of the analysis of the foregoing authorities and the legal principles upon which these decisions rest, it is my opinion that the legislature is not prohibited by any provision of the Constitution nor by any equitable principles from transferring funds from the motor vehicle accident claims fund to the general fund where such transfer would not prejudice present or future liabilities of the fund.

Very truly yours,

/s/ FRANK J. KELLEY
Frank J. Kelley
Attorney General

[2] Memorandum Opinion No. 719 dated October 12, 1960

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FILED
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ALEX ... STEVAS

No. 83-1765

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIE BRAY, LORENE DAVIS, RANDOLPH WIGGINS, JOAN COLBURN, MARY ROE, JOHN DOE, and all other members of the Class,

Petitioners,

vs.

STATE OF MICHIGAN: Governor of the State of Michigan; MICHIGAN DEPARTMENT OF STATE: Secretary of State; MOTOR VEHICLE ACCIDENT CLAIMS FUND DIVISION: Director of the Motor Vehicle Accident Claims Fund; State Treasurer; DEPARTMENT OF COMMERCE—INSURANCE BUREAU: Commissioner of Insurance,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN
BRIEF IN OPPOSITION

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Attorney General

Louis J. Caruso
Solicitor General

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QUESTIONS PRESENTED

I

IS THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES A JURISDICTIONAL BAR TO PETITIONERS' APPEAL?

II

DO PETITIONERS POSSESS PROPERTY RIGHTS OR CONTRACT RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION?

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Petitioners,

vs.

STATE OF MICHIGAN: Governor of the State of Michigan; MICHIGAN DEPARTMENT OF STATE: Secretary of State; MOTOR VEHICLE ACCIDENT CLAIMS FUND DIVISION: Director of the Motor Vehicle Accident Claims Fund; State Treasurer; DEPARTMENT OF COMMERCE—INSURANCE BUREAU: Commissioner of Insurance,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN OPPOSITION

OPINION BELOW

The Michigan Supreme Court Opinion is reported at 418 Mich. 149, 341 N.W.2d 92 (1983), and appears at page 3a of Petitioners' Appendix.

JURISDICTION

The jurisdiction of this Court is barred by the Eleventh Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

US Const, Am XI provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Michigan Public Act providing appropriations, 1977 PA 98, provides, in pertinent part:

"Uninsured Motorists

Salaries and wages—not to exceed 88.0 positions	$ 1,350,800
Longevity and insurance	77,100
Retirement	208,100
Contractual services, supplies and materials	126,500
Travel	51,400
Equipment	3,100
Subtotal Uninsured Motorists	$ 1,817,000"

1965 PA 388; MCLA 500.3010; MSA 24.13010, provides:

> "No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto in limits for bodily

injury or death set forth in section 504 of Act No. 300 of the Public Acts of 1949, as amended, being section 257.504 of the Compiled Laws of 1948, under provisions approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, including owners or operators insured by an insolvent insurer, because of bodily injury, sickness or disease, including death, resulting therefrom, unless the names insured rejects such coverage in writing as provided herein. All such policies shall contain a notice, displayed prominently on the front page of the policy, in at least 8-point type that such protection coverage was explained to him and that he can reject such coverage by notice in writing. Unless the named insured requests such coverage in writing, it need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage in connection with a policy previously issued to him by the same insurer."

STATEMENT OF THE CASE

In 1965, the State of Michigan sought to remedy the problems of victims of tortiously liable uncollectible drivers. The Legislature enacted 1965 PA 198; MCLA 257.1101 *et seq*; MSA 9.2801 *et seq*, known as the Motor Vehicle Accident Claims Act. This act, by its title, stated its purpose as:

"AN ACT providing for the establishment, maintenance and administration of a motor vehicle accident claims fund for the payment of damages for injury to or death of certain persons or property damage arising out of the ownership, maintenance or use of motor vehicles in the state in certain cases."

The act was effective November 1, 1965, which was the first day of registration of all motor vehicles in the State of Michigan for the ensuing year. MCLA 257.226; MSA 9.1926.[1]

The Motor Vehicle Accident Claims Fund was initially funded by requiring each uninsured motorist to pay a $25.00 fee and each insured motorist a $1.00 fee at the time the vehicle is registered for the year. Uninsured motorist fees were increased to $35.00 in 1968 and to $45.00 in 1971. No insured motorist fees were paid during the fiscal year 1972-1973, but during the entire period approximately 25% of all fees collected were received from insured motorists. Also, insured drivers were required by 1965 PA 388; MCLA 500.3010; MSA 24.13010, to purchase uninsured motorist coverage in order to limit claims against the fund, unless they rejected such coverage in writing.

On October 31, 1972, the No Fault Insurance Act, 1972 PA 294; MCLA 500.3101 *et seq;* MSA 24.13101 *et seq,* was approved by the Governor. That act provided that on October 1, 1973, in addition to the introduction of the no fault concept, all motorists must be insured and must provide evidence of insurance. (95a) The No Fault Act was effective October 1, 1973 for compulsory insurance purposes because the only way to determine whether a vehicle was insured was to require proof of insurance in order to register the vehicle for the ensuing year. The 1973 registration period for commercial vehicles commenced October 1, 1972 and terminated the last day of February, 1973. The first date for registration of non-commercial vehicles for the year 1973 was November 15, 1972 and terminated March 31, 1973. However, the full $45.00 fee

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[1]

A 1966 statute provided that commercial vehicles and trailers commence registration on October 1 preceding the year designated on the plates. A 1967 statute provided that non-commercial vehicles commence registration on November 15 preceding the year designated on the plates.

was required if an uninsured vehicle was registered after the registration period terminated.

This action was commenced in August of 1973 in the Court of Claims for the State of Michigan and, by stipulation of the parties, removed to the Wayne County Circuit Court. The history of the progress of this suit through the courts of the State of Michigan is detailed in the majority opinion of the Michigan Supreme Court, commencing at 5a.

For the purpose of this appeal, Petitioners allege that they were deprived of property without just compensation in violation of the Fifth Amendment to the Constitution of the United States and that an alleged contract was impaired in violation of Article I, Section 10, of the United States Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. The majority opinion of the Michigan Supreme Court, issued December 1, 1983, found that the uninsured motorist fee could only be viewed as a tax for the privilege of operating an uninsured motor vehicle. The Court found no contractual or licensing arrangements existed between Petitioners and the State, and therefore found Petitioners' constitutional claims without merit. (14a) The Court further found that Petitioners were entitled to a refund only if there was an express or an implied legislative intent to refund the fee.

REASONS FOR DENYING THE PETITION

I

THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BARS FEDERAL-COURT JURISDICTION OVER THIS SUIT BY PRIVATE PLAINTIFFS SEEKING MONEY DAMAGES FROM THE STATE OF MICHIGAN

This suit seeks retroactive money damages from the treasury of the State of Michigan for fees paid by Petitioners from October 1, 1972 through March 31, 1973, in order to register their uninsured vehicles for the year 1973 because the No Fault Act of the State of Michigan made insurance compulsory beginning October 1, 1973. It is the position of Petitioners that the Legislature of the State of Michigan should have enacted a refund because they could only drive their uninsured vehicles until October 1, 1973, instead of March 31, 1974, without violating the No Fault Act. As indicated in the opinion of the Michigan Supreme Court, the Michigan Legislature considered such a refund but enacted a law which made no provision for a refund. (13a)

Since no refund was enacted, Petitioners argue that the No Fault Act should not have required compulsory insurance until April 1, 1974. The No Fault Act was effective October 1, 1973 because that was the first day of registration of vehicles for the ensuing year. If the State had made April 1, 1974 the effective date of the No Fault Act, as Petitioners argue, then no proof of insurance would have to have been shown at registration and the uninsured motorist fee could be paid. This would mean, in effect, that an uninsured motorist who registered his/her vehicle for the year 1974 on March 31, 1974 would be required to have no fault insurance one day after

paying the uninsured motorist fee. The only feasible date for instituting compulsory insurance was the first date upon which registration of vehicles was permitted by Michigan law because proof of insurance could be required at that time. Petitioners have always assumed throughout their arguments that all Petitioners registered their vehicles on the last day of registration for non-commercial vehicles, March 31, 1973, and were therefore denied six months of their privilege to drive uninsured, even though commercial vehicles could register as early as October 1, 1972, and thus would have received a full year's privilege of driving uninsured. Moreover, all motorists who registered after October 31, 1972, the date the No Fault Act was enacted, which includes all non-commercial vehicles, were on notice by the enactment of the No Fault Act that their privilege to drive uninsured ceased on September 30, 1973.

Petitioners aver that certain property rights were created by Michigan law and that those property rights were violated by the State of Michigan, either through its inaction in failing to provide a legislative refund, or by its action in requiring insurance on October 1, 1973. Neither the majority nor the dissenting opinions in the Michigan Supreme Court found any contractual rights created by the Motor Vehicle Accident Claims Act. Neither opinion found that the fee was a regulatory fee. The majority opinion of the Michigan Supreme Court found that the fee was a tax.

The Motor Vehicle Accident Claims Fund is currently actuarily insolvent so that any refund of the tax would be directly from the state treasury. Therefore, this action is barred by the Eleventh Amendment to the United States Constitution. *Ford Motor Company* v *Department of Treasury*, 323 US 459; 65 S Ct 347; 89 L Ed 389 (1945). Even if a basis could be found for finding a federal constitutional violation, Petitioners' suit is barred by the Eleventh Amendment because

they are seeking retroactive relief against the State of Michigan. *Edelman* v *Jordan*, 415 US 651; 94 S Ct 1347; 39 L Ed 2d 662 (1974). This Court distinguished between prospective and retroactive relief when a state is sued by individuals for federal constitutional violations as follows:

> "The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This is the significance of Edelman v Jordan, supra. We recognized that the prospective relief authorized by [*Ex parte Young*, 209 US 123 (1908)] 'has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely a shield, for those whom they were designed to protect.' 415 US, at 664, 39 L Ed 2d 662, 94 S Ct 1347. But we declined to extend the fiction of Young to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States. Accordingly, we concluded that although the difference between permissible and impermissible relief 'will not in many instances be that between day and night, id., at 667, 39 L Ed 2d 662, 94 S Ct 1347, an award of retroactive relief necessarily '"fall[s] afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force."' Id., at 665, 39 L Ed 2d 662, 94 S Ct 1347 (quoting Rothstein v Wyman, 467 F2d 226, 237 (CA2 1972) (McGowan, J., sitting by designation), cert denied, 411 US 921, 36 L Ed 2d 315, 93 S Ct 1552 (1973)). In sum Edelman's distinction between prospective and retroactive relief fulfills the underlying purpose of Ex parte Young while at the same time preserving to an important degree the constitutional immunity of the States."

***Pennhurst State School and Hospital, et al* v *Haldeman, et al*,** — US —; 104 S Ct —; 79 L Ed 2d 67, 81-82 (1984).

II

PLAINTIFFS POSSESS NEITHER A PROPERTY INTEREST NOR A CONTRACT PROTECTED BY THE UNITED STATES CONSTITUTION

When the State of Michigan established the Motor Vehicle Accident Claims Fund, it did not create property interests. Prior to adoption of the Motor Vehicle Accident Claims Act, uninsured drivers were permitted to drive their uninsured vehicles without the payment of any fee to the State of Michigan. Michigan experience had shown that uninsured drivers were largely uncollectible and that there was no recourse in most cases for their victims. The victims' pain and suffering was exacerbated by the fact that they were required to pay their own medical bills and absorb their wage losses.

The Motor Vehicle Accident Claims Act created a fund solely for the benefit of the victims of accidents where the driver was either unidentified or uninsured. There was no creation of a new right or a new entitlement in the Petitioners. What the Petitioners could do prior to the act—drive their vehicles uninsured—now required the payment of a fee. With this fee, they purchased nothing. They received no insurance; they received no contract. They remained fully liable for the accident. The only difference was that victims now had a reason to sue. The defense of uncollectibility had been statutorily eliminated by the Motor Vehicle Accident Claims Act.

The state, which became subrogated to the judgment of the victim, could suspend the driver's license and vehicle registration of uninsured drivers if they did not repay the judgment. Petitioners argue that they were not totally without benefits because they received an interest-free $10,000 loan

and free representation by an Assistant Attorney General. This characterization of the statute is wholly inaccurate, however, since the Assistant Attorney General represented the Motor Vehicle Accident Claims Fund and not the uninsured motorist. *Weisberg* v *DAIIE*, 36 Mich App 513; 194 NW2d 193 (1971); *Abbott* v *Secretary of State*, 84 Mich App 23; 269 NW2d 292 (1978), relief denied, 406 Mich 940 (1979). If the uninsured driver refused to enter into a repayment contract with the Secretary of State to pay the judgment, it was an Assistant Attorney General who then sought judgment against the uninsured driver even though the Secretary of State had already suspended both the uninsured driver's operator's license and motor vehicle registration.

Instead of buying a property right with the fee, the uninsured drivers bought the certainty of suit in the event they refused to admit liability and the certainty that they would lose their operator's licenses and motor vehicle registrations in the event they refused to enter into a repayment arrangement with the Secretary of State. It is small consolation that this arrangement for repayment was interest-free and it is doubtful that any uninsured driver paid the $45.00 fee in order to purchase this "benefit".

The Michigan Supreme Court commented in their Opinion (8a-9a) that if there were any benefits received by the Petitioners, those benefits elude the Court.

Petitioners next argue that they had an entitlement to drive uninsured for a certain period of time, which constituted a contract right. They certainly cannot claim such an entitlement from the statute. The statute did not provide licensing for a certain term or any refunds for a shorter term. As the Michigan Supreme Court points out:

> "... It [the statute] did not say that, if 30 days from the registration and the payment of the fee a person

> were to decide to purchase insurance, he could get a refund of 11/12 of the $45 fee, nor did it say that, if a person were to purchase and register a new uninsured motor vehicle halfway through the year, he would pay only half the $45 fee. It merely set a fee and the time and circumstances for paying the fee. . . ." (13a)

The $45.00 fee was paid not only during the registration period, October 1 through March 31, but also throughout the entire year whenever uninsured vehicles were registered for the first time. There clearly never was an entitlement to drive uninsured for a certain period; nor was there a contract, implied or otherwise, that indicated that the Petitioners were buying a privilege for a certain term. Uninsured drivers were not buying or receiving; instead, they were paying for a small part of the problem their class caused.

Petitioners argue that part of the 1973 fee was "unearned." Petitioners fail to acknowledge that their payments covered only a small part of the burden they caused. A larger burden was carried by the insured drivers, who not only paid a $1.00 fee, which approximated 25% of all fees collected by the fund, but also were required to carry mandatory uninsured motorist coverage which could only be rejected in writing. Uninsured motorist coverage was made a mandatory part of every policy issued in the State of Michigan in order to limit the number of claims which would be made upon the fund. Insured drivers were required to exhaust their own uninsured motorist insurance coverage before filing a claim with the fund. The fact that insured drivers rarely rejected the uninsured motorist coverage enabled uninsured drivers to pay a far smaller fee than would be necessary if all drivers could file a claim with the fund.

It is also important to note that the fund is still operative and accepting new claims. The Legislature enlarged the time

limits respecting the fund to cover accidents which occurred as late as January 2, 1976. (26a, fn 19). Until all minors injured in accidents prior to January 2, 1976 have reached majority plus the three year statute of limitation, the fund is liable for payment of new claims. The fund is currently actuarily insolvent and therefore it may be necessary to pay claims from the state treasury. In addition to future payments from the state treasury, in 1977, by Public Act No. 98, the Legislature appropriated $1,817,000 to cover administrative expenses of the fund in lieu of interest payments on the loan which it earlier made from the fund.

Truly, their is no constitutional or equitable reason why the taxpayers of Michigan should reimburse a portion of the 1973 fee to Petitioners, who contributed so little to remedy the problems they caused for their victims. Indeed, if anyone were entitled to a refund, it would be those insured drivers who responsibly carried uninsured motorist coverage in their policies as well as paid the annual $1.00 fee.

CONCLUSION

The State of Michigan has not waived its immunity from suit and is entitled to the protection of the Eleventh Amendment of the Constitution of the United States. Petitioners possess no property rights or contract rights protected by the United States Constitution. Equity would not be served by requiring the taxpayers to reimburse Petitioners whose uninsured driving was subsidized by the insured driving public of the State of Michigan. The petition should be denied.

Respectfully submitted,

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No. 83-1765

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIE BRAY, LORENE DAVIS, RANDOLPH WIGGINS, JOAN COLBURN, MARY ROE, JOHN DOE, and all other members of the Class,
Petitioners,

vs.

STATE OF MICHIGAN: Governor of the State of Michigan; MICHIGAN DEPARTMENT OF STATE: Secretary of State; MOTOR VEHICLE ACCIDENT CLAIMS FUNDS DIVISION: Director of the Motor Vehicle Accident Claims Fund; State Treasurer; DEPARTMENT OF COMMERCE — INSURANCE BUREAU: Commissioner of Insurance,
Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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INTRODUCTION

Respondents' brief contains virtually no case law and establishes that the decision below is totally indefensible. Rather than address the issues, Respondents assert that under the Eleventh Amendment, this Court cannot *review* a state court case in which the state was a party. *This argument was considered, rejected and laid to rest by this Court in 1821.*

Not only are Respondents' arguments without merit or support, they are based upon misstatements of fact.

REASONS FOR GRANTING THE PETITION

1. THE ELEVENTH AMENDMENT IS NOT A BAR

Under the Eleventh Amendment, "an unconsenting state is immune from suits brought in federal courts by her own citizens. . . . *Pennhurst State School & Hospital* v. *Halderman*, ____ U.S. ____, 104 S.Ct. 900, 79 L.Ed.2d 67, 78 (1984), quoting *Employees* v. *Missouri Public Health & Welfare Dep't.*, 411 U.S. 279, 280, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). The Amendment thus applies only to suit *commenced* in the federal courts, and not to cases instituted in state courts which are reviewed by this Court. Indeed, in *Cohens* v. *Virginia*, 19 U.S. 264, 5 L.Ed. 257 (1821), this Court held that the Eleventh Amendment does not bar this Court's review of state court decisions, regardless of the identity of the parties:

> "It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court for the purpose of re-examining the question whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the state whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands.
>
> * * *

> *It [the request for review by this Court] is not then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.*" 19 U.S. at 412 (emphasis added).[1]

Even assuming the Eleventh Amendment was somehow applicable to a review of this case, it would not be a bar. Respondents' position is premised on two erroneous statements — 1) that Plaintiffs seek retroactive money damages and 2) that a refund would come from the State Treasury. Both statements are totally false.

In this case, Plaintiffs filed suit before the effective date of the No-Fault Act, that is, before Plaintiffs' privilege to drive as uninsured motorists was terminated, without a refund of any portion of the fee Plaintiffs had paid for that privilege. Plaintiffs sought a judicial declaration that the *anticipated* actions by the state, its agencies, and individual officers would be unconstitutional. In other words, Plaintiffs sought to compel a return of the *pro rata* share of the $45 fee if a portion of the privilege were terminated.[2]

Edelman v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1437, 39 L.Ed.2d 662, *reh. denied*, 416 U.S. 100 (1954), specifically

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[1] *Accord: Smith* v. *Reeves*, 178 U.S. 436, 445, 20 S.Ct. 919, 44 L.Ed. 1140 (1900). *See generally*, Tribe, *American Constitutional Law* (1978), p. 131 ("And neither sovereign immunity nor the eleventh amendment bars Supreme Court review of state court judgments in suits in which the state is a party since supremecy of federal law requires review of the federal questions presented by such judgments.").

[2] The No Fault Act became effective on October 1, 1973. The date the Act was passed is not relevant. Under Michigan law, until a statute becomes effective (i.e. on the stated date of effectiveness), it is not notice and is not binding. *See, Price* v *Hopkins*, 13 Mich. 318 (1865); *Weaver* v. *Harvey*, 32 Mich. App. 424, 188 N.W.2d 905 (1971).

held that this sort of prospective relief against state officers does not offend the Eleventh Amendment:

> "As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night. The injunction issued in *Ex Parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham* v. *Richardson*, 403 US 365, 29 L Ed 2d 435, 91 S Ct 1848 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg* v. *Kelly*, 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. *But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature.* State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*

But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary con-

sequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard . . . It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." 415 U.S. at 667-668 (emphasis added).

In addition, even where a plaintiff seeks relief for a state defendant's past unconstitutional actions, *Edelman* only proscribes compensatory damages "*which must be paid from public funds in the state treasury*" or "which must be met from the general revenues of a state." *Id.* at 663, 664 (emphasis added). In this case, Plaintiffs have only asked for the return of a portion of their *own money* which was held in trust by the State in a separate fund, distinct from the general revenues the State collected from the public at large. Because Plaintiffs only sued for the return of their own funds about to be wrongfully withheld and converted by the defendant-trustees, the Eleventh Amendment would not have barred relief, even retroactively (after the conversion occurred).[3]

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[3] Respondent asserts that the Fund is "currently actuarily insolvent." Respondent's brief, p. 7. The so-called insolvency was created by a transfer of trust fund moneys to the General Fund. This was accomplished by a failure to pay interest on loans from the trust fund to the General Fund (*see*, Petition, pp. 29-32) and subsequently, by a complete transfer of the corpus of trust fund to the General Fund. For example in the years 1976-1983, the following moneys were transferred from the Fund:

1976 Mich. Pub. Acts, No. 241 §1	$ 7,309,974
1977 Mich. Pub. Acts, No. 98, §1	$ 793,955
1978 Mich. Pub. Acts, No. 402, §1	$ 3,171,700
1979 Mich. Pub. Acts, No. 111, §1	$10,350,900
1980 Mich. Pub. Acts, No. 376, §1	$ 3,691,000
1981 Mich. Pub. Acts, No. 30, §1	$ 1,923,800
1982 Mich. Pub. Acts, No. 281, §1	$ 1,415,800
1983 Mich. Pub. Acts, No. 170, §1	$ 1,446,800

Hence, the General Fund is holding trust fund moneys, which are not public funds or general revenues of the State.

Finally, plaintiffs would be entitled to both prospective and retroactive relief, whether from general public funds or from the trust fund of Plaintiffs' uninsured motorist fees, because the State waived its Eleventh Amendment sovereign immunity and consented to be sued on Plaintiffs' claims. It is axiomatic that the Eleventh Amendment is inapplicable if a state waives its sovereign immunity or consents to suit. *Eg. Edelman* v. *Jordan, supra; Clark* v. *Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883) ("The immunity from suit belonging to a state . . . is a personal privilege which it may waive at pleasure."). Moreover, a state may so waive its immunity by its actions in voluntarily participating in proceedings against it, by actively defending on the merits rather than appearing only to protest the court's exercise of jurisdiction. *Clark*, 108 U.S. at 447-448; *Ford Motor Co.* v. *Treasury Dep't. of Indiana*, 323 U.S. 459, 65 S. Ct. 347, 89 L.Ed.2d 389 (1945). When a state affirmatively participates in the litigation and defends on the merits, without raising a claim of immunity until the final appeal, the state is deemed to have consented to suit and waived its Eleventh Amendment Immunity — as long as the officer who represented the state in the proceedings was authorized to consent to suit and waive the immunity. *Ford*, 323 U.S. at 467.

The State of Michigan has authorized the Attorney General to waive sovereign immunity and consent to suit in specific cases, even in the absence of a legislative enactment waiving immunity. In *Hunt* v. *State Highway Comm'n.*, 350 Mich. 309, 86 N.W.2d 345 (1957), the Michigan Supreme Court rejected the state's claim of sovereign immunity, even though no statute waiving the immunity was applicable in the case and declared:

> "From these postulates we turn initially to the fact that defendant unequivocally submitted himself to the jurisdiction and thereby cast aside the vestments of immunity, if such ever were worn by him. There was no thought or suggestion of immunity when the suit was

> instituted or thereafter during trial thereof . . . . It was not until the chancellor ruled by formal opinion that plaintiffs were entitled to relief, and that the cross bill should be dismissed, that this 'I cannot be sued' defense was brought forth.
>
> Equity is impatient with games of such nature — the essence of which is affirmation of jurisdiction should the chancellor rule favorably and a denial of jurisdiction otherwise — and regards entry upon suit by a State officer, through bill or cross bill authorized by him, as carrying with it the acceptance of whatever liability the chancellor may decide is reasonably incident to such pleading and appeal for relief." 350 Mich. at 320.

Similarly, in *People, ex rel. Attorney General* v. *Detroit, G.H. & M.R. Co.*, 157 Mich. 144, 158, 121 N.W. 814 (1909), the Michigan Supreme Court held that the statutes authorizing the Attorney General to represent the state in lawsuits "constitute a waiver of the rights of the state not to be sued without its consent." The Court found that where the state, through its authorized agent, the Attorney General, contested a suit on the merits, and the state actively appealed, and so became the moving party, taking the plaintiff to a higher court and protracting the litigation, then "the acts and conduct of the state after suit was brought, as above stated, constitute a waiver of its immunity." *Id.*

It is abundantly clear that under Michigan law the state may waive its sovereign immunity through the actions of the Attorney General in actively contesting the suit on the merits, appealing an adverse decision and only asserting immunity at the eleventh hour when the case has reached the court of last resort. Here it is beyond dispute that the state, by participating, defending, and appealing to the State Supreme Court without so much as a mention of immunity, has waived whatever claim of sovereign immunity it might have had and has consented to be sued on Plaintiff's claims. Thus the Eleventh Amendment posed no obstacle to relief.

2. RESPONDENTS' ARGUMENT THAT PLAINTIFFS DID NOT HAVE A PROPERTY INTEREST OR CONTRACT IS BASED ON MISSTATEMENTS OF FACT

In their petition, Plaintiffs established the property rights which they had acquired upon payment of the $45 fee. *See*, Petition, pp. 16-29. There is no question that without payment, Plaintiffs could not legally operate their uninsured vehicles.

Respondents assert that Plaintiffs acquired no property interest because insured motorists contributed $1 and were required to carry mandatory uninsured motorist coverage. Both claims are completely untrue. *Insured motorists* did not contribute 1¢ to the Fund after the 1971 registration year (4a, n. 1). And, insured motorists were not required to purchase uninsured motorist coverage — insurance companies were required to offer it. Mich. Comp. Laws §550.3010.

The plain fact is that Plaintiffs paid $45 in return for the right to operate their uninsured vehicles and their moneys were unlawfully converted and their entitlements terminated in violation of the constitution of the United States.

CONCLUSION

For the reasons expressed in the Petition and this Reply this Court should grant certiorari.

Respectfully submitted,
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